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Supreme Court, U.S.
FILED

No. 08-325 SEP 8 - 2008

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In the
Supreme Court of the United States

MANTA MANAGEMENT CORPORATION,
Petitioner,

v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a municipality be held liable for damages under the Federal Civil Rights Act (42 U.S.C. Section 1983) for obtaining a preliminary injunction to enforce an ordinance that is later found to be invalid as an unconstitutional impingement on the First Amendment right to freedom of speech?

2. Did the California Supreme Court in the decision below fail to following the teaching of this Court in Malley v. Briggs, 475 U.S. 335, 344 footnote 7 (1986), where this Court stated with reference to liability under the Federal Civil Rights Act that ". . . a man [is] responsible for the natural consequences of his action. . . ."

3. When state trial and appellate courts' actions (first in granting a preliminary injunction shutting down an adult cabaret, second in granting a stay of a subsequent order dissolving the preliminary injunction, and third, in delaying the final state appellate court decision for a number of years to enforce a city ordinance that violates the First Amendment) damage an adult cabaret, may the adult cabaret rely upon this Court's statement in City of Littleton v. Z.J. Gifts, 541 U.S. 774, 782, 124 S.Ct. 2219, 2225, 159 L.Ed.2d 84 (2004) that ". . . federal remedies [42 U.S.C. Section 1983] would provide an additional safety valve . . ." for problems caused by the state judicial system?

PARTIES TO THE PROCEEDINGS

Petitioner: Manta Management Corporation is the sole owner of the Flesh Club, an adult cabaret in San Bernardino, California. Its stock is wholly owned by Waldon Randall Welty.

Respondent: The City of San Bernardino is a municipal corporation organized and existing under the laws of the State of California and located in San Bernardino County, California.

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Manta Management Corporation, doing business as the Flesh Club, respectfully prays that a Writ of Certiorari issue to review the judgment and the opinion of the California Supreme Court filed on April 24, 2008 and modified on June 18, 2008.

On June 18, 2008 the Supreme Court of California denied Petitioner's timely Petition for Rehearing.

OPINIONS BELOW

The order of the California Supreme Court denying Petitioner's Petition for Rehearing filed June 18, 2008 is reprinted in Appendix A hereto ("App. A") at page 1a. The June 18, 2008 modification of the prior opinion is reprinted at Appendix B hereto ("App. B") at page 2a. The decision of the California Supreme Court filed April 24, 2008, 43 Cal.4th 400; 75 Cal.Rptr.3d 353; 181 P.3d 159 (2008) is reprinted here in Appendix C hereto ("App. C") at page 4a.

The decision of the California Court of Appeal, Fourth Appellate District, Division Two, filed May 11, 2006, 44 Cal.Rptr.3d 35 (2006) is reprinted in Appendix D hereto ("App. D") at page 25a.

The judgment after jury trial filed by the Superior Court of the State of California for the County of San Bernardino on September 23, 2004 is reprinted at Appendix E hereto ("App. E") at page 58a. The judgment after jury trial is not reported.

JURISDICTION

This Court has certiorari jurisdiction by virtue of Title 28, United States Code, Section 1257. Rule 13 of this Court's rules provides that this Petition may be filed within 90 days of the date the California Supreme Court denied a timely filed Petition for Rehearing. The California Supreme Court denied a Petition for Rehearing on June 18, 2008.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

The First Amendment to the United States Constitution provides, in part, as follows:

> "Congress shall make no law ... abridging the freedom of speech ..."

The Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

FEDERAL STATUTE

Title 42, United States Code, Section 1983 provides, in part, as follows:

> "Every person who, under color of any . . . ordinance . . . subjects, or causes to be subjected, any . . . other person . . . to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

The following facts are taken from the Decision of the California Supreme Court in a published decision filed April 24, 2008, Manta Management Corp., v. City of San Bernardino, 43 Cal.4th 400 (2008).

In 1994 Petitioner Manta Management Corp., (hereinafter "Manta") opened a comedy club nightclub in the CR-3 zone of Respondent City of San Bernardino (hereinafter "the City"). The CR-3 zone allowed nightclubs but not adult nightclubs. Adult nightclubs were only permitted in the CH (Heavy Commercial) or IL (Light Industrial) zones. Six months after Manta opened its comedy nightclub, Manta converted it to an adult cabaret and began presenting "topless entertainment" in the place of comedy. The change from comedy to adult entertainment meant that Manta was no longer in compliance with the City's zoning code.

In January 1995 the City filed a lawsuit in the state court seeking to enjoin the operation of Manta's cabaret on the ground that the presentation of topless dancing was a violation of the City's zoning laws and therefore should be enjoined. The City sought and obtained both a temporary restraining order and later a preliminary injunction prohibiting the presentation of adult entertainment in the form of topless dancing. Manta appealed from the order granting the

preliminary injunction. While its appeal was pending Manta filed a cross complaint in the state trial court for damages under the Federal Civil Rights Act. By stipulation the trial was bifurcated. The trial court conducted a bench trial and declared that the zoning code was unconstitutional in violation of Manta's First Amendment right to free speech. The trial court concluded, among other things, that the City's zoning code did not provide for reasonable alternative avenues of communication. The trial court's order dissolving the preliminary injunction mooted the prior appeal from the order granting the preliminary injunction. The state trial court followed this Court's decision in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). The City appealed to the California Court of Appeal, Fourth Appellate District, Division Two and pending that appeal the City sought and obtained a temporary stay and Writ of Supersedeas to prohibit topless dancing while the City appealed from the order dissolving the preliminary injunction, an order which is appealable under California law. Thus, Manta was precluded from resuming the presentation of topless entertainment, an activity which is protected by the First Amendment.

On January 26, 1999 the California Court of Appeal in a non published decision affirmed the order of the state trial court dissolving the preliminary injunction. The Court of Appeal also dissolved the stay it previously had issued in response to the request by the City. However, the order dissolving the stay did not become effective until the California Supreme Court denied review on April 21, 1999 by a non published order.

Thereafter, Manta proceeded on its cross complaint for damages (lost profits for the time that it was precluded from presenting topless entertainment protected by the First Amendment). In a bench trial the state trial court ruled that the initial issuance of the temporary restraining order and preliminary injunction by the state trial court and the later temporary stay and writ of supersedeas issued by the California Court of Appeal, all to enforce the City's unconstitutional adult zoning code, violated Manta's federally protected rights and constituted a basis for liability under the Federal Civil Rights Act, Title 42, United States Code, Section 1983. The state trial court found that the City's ordinance itself was not the basis for federal civil rights act liability. At the City's request, a jury was then impaneled to determine the damages suffered by Manta and the jury rendered a verdict in favor of Manta in the sum of $1,400,000.00 in damages for lost profits while Manta was subject to the restraining order, preliminary injunction, and the stay and writ of supersedeas.

The City appealed to the California Court of Appeal, Fourth Appellate District, Division Two. The California Court of Appeal affirmed the judgment of the Superior Court. Specifically, the Court of Appeal held that the City's act of obtaining the injunction to enforce the unconstitutional ordinance was an act in violation of the First Amendment within the meaning of Section 1983 of the Federal Civil Rights Act. The Court of Appeal specifically ruled that a city is liable for damages under the Civil Rights Act if it chooses to enforce an unconstitutional ordinance by means of a preliminary injunction.

The City then asked the California Supreme Court to review the case and the Supreme Court granted a Petition for Review. The California Supreme Court ruled that the Court of Appeal erred in concluding that liability existed under the Federal Civil Rights Act without considering causation. Although Manta relied heavily upon this Court's decision (footnote 7) in Malley v. Briggs, 475 U.S. 335, 344, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986), the California Supreme Court ignored this Court's decision (footnote 7) completely in its initial decision filed April 24, 2008. Manta had argued before the Supreme Court in its Brief and also during oral argument that this Court in Malley v. Briggs, in dictum, concluded that liability would exist when a preliminary injunction violates the First Amendment. Specifically, Manta quoted footnote 7 of this Court's decision in Malley v. Briggs, as follows:

> "Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of §1983. As we stated in Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), §1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his action.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983 as recognizing the same causal link."

In its decision the State Supreme Court ignored footnote 7 quoted above and ruled that the California Court of Appeal was wrong to find liability. The California Supreme Court remanded the case to the Superior Court to consider an alternative theory for liability advanced by Manta - that the City in seeking and obtaining the preliminary injunction misrepresented the facts to the original trial court that issued the preliminary injunction. The California Supreme Court ruled that if the trial court was misled, whether deliberately or negligently, then liability would exist. However, in the absence of misrepresentation by the City to obtain the preliminary injunction and to obtain the stay and writ of supersedeas from the Court of Appeal, there would be no liability.

On April 28, 2008 Manta filed a timely Petition for Rehearing with the California Supreme Court wherein it specifically pointed out that the California Supreme Court ignored this Court's decision in Malley v. Briggs, supra.

Without ordering a rehearing and without ordering further briefing, the California Supreme Court modified its opinion to include a reference to this Court's decision in Malley v. Briggs, supra. The California Supreme Court added a footnote to its decision wherein it stated that its decision was consistent with the United States Supreme Court's comment in footnote 7 of its Opinion in Malley v. Briggs, supra.

The judge of the trial court who issued the temporary restraining order and preliminary

injunction, the Honorable Duane Lloyd, was not the trial court judge who conducted the initial bench trial on the constitutionality on the zoning code. That was Superior Court Judge Carl Davis. Finally, the trial court judge who conducted the trial on liability under the Federal Civil Rights Act and who presided over the jury trial on damages was still a third judge, the Honorable Donald Alvarez.

REASONS FOR GRANTING THE WRIT

1. Certiorari Should Be Granted To Resolve The Conflict Between The Decision of the California Supreme Court Below And The Decisions of the Tennessee Appellate Courts Regarding The Application of the Federal Civil Rights Act To State Court Preliminary Injunctions Which Enforce Unconstitutional Ordinances

Certiorari should be granted to resolve the conflict over the proper interpretation and application of the Federal Civil Rights Act to state court injunctions that limit the First Amendment rights of adult businesses. In the decision below by the California Supreme Court an adult business was not allowed to recover damages from the City which enforced by a preliminary injunction its unconstitutional ordinance. The California Supreme Court did limit the scope of its ruling by declaring that if a City materially misleads a state trial court judge who grants a preliminary injunction based upon the deception then there would be liability under the Federal Civil Rights Act. The ruling by the California Supreme Court below unnecessarily restricted the earlier ruling by the

California Court of Appeal, which had ruled that a city is absolutely liable under the Civil Rights Act for obtaining and enforcing a preliminary injunction based upon an unconstitutional ordinance that the City itself adopted.

The decision of the California Supreme Court disapproved the ruling of the California Court of Appeal even though the ruling of the California Court of Appeal was consistent with the decisions of the Court of Appeals of Tennessee and the Supreme Court of Tennessee, City of Knoxville v. Entertainment Resources, LLC, 166 S.W. 3d 650 (Tenn. 2005), cert.den. 546 U.S. 1061, 163 L.Ed.2d 627, 126 S.Ct. 798 (2005). In the instant case, as the California Supreme Court recognized, the California Court of Appeal ". . . held that the city's act of obtaining an injunction to enforce an unconstitutional ordinance is an act in violation of the First Amendment within the meaning of Section 1983. . . ." Manta Management Corp., v. City of San Bernardino, 43 Cal.4th 400, 406, 75 Cal.Rptr. 3d 353, 181 P.3d. 159 (2008). The decision of the California Court of Appeal, described above by the California Supreme Court, was consistent with Tennessee court decisions.

In the Tennessee case Entertainment Resources, the owner of a video tape movie rental store which rented sexually explicit x-rated video tapes, was sued by the City of Knoxville because Entertainment Resources was considered by the City to be an adult business and was operating in violation of Knoxville's adult zoning ordinance, which prohibited adult businesses from being operated at the location of Entertainment Resources. The Tennessee trial court

granted Knoxville's request for a temporary injunction to enforce Knoxville's adult zoning ordinance pending trial. This is exactly what happened to Manta Management in the instant case.

In response to Knoxville's lawsuit and temporary injunction Entertainment Resources filed a counterclaim which alleged that the Knoxville ordinance was unconstitutional and which sought damages ". . . as a result of its enforcement." City of Knoxville v. Entertainment Resources, 2003 Tenn. App. LEXIS 821 (2003). Later, when the store closed, Knoxville requested the Tennessee trial court to dismiss the case on mootness grounds. The Tennessee trial court dismissed the complaint for injunctive relief but noted that Entertainment Resources ". . . retained the right to seek damages should it turn out that the temporary injunction was wrongfully issued." City of Knoxville v. Entertainment Resources, 2003 Tenn. App. LEXIS 821 (2003).

Still later the trial court ruled that Entertainment Resources was not wrongfully enjoined. The case was dismissed and Entertainment Resources appealed. On appeal the Court of Appeals of Tennessee held that the ordinance was unconstitutional. The Court of Appeals of Tennessee then discussed the applicability of the Federal Civil Rights Act (42 U.S.C. Section 1983) to Entertainment Resources counterclaim for damages for ". . . lost profits because of the entry of the preliminary injunction . . . ."

The Tennessee Court of Appeals reversed the judgment of the trial court and remanded the case for a determination of damages. The Tennessee Court of

Appeals quoted the Federal Civil Rights Act and stated that "the remedial purpose of 42 U.S.C. Section 1983 is "to 'ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.'" (2003 Tenn. App. LEXIS 821 (2003))

Thereafter, the Supreme Court of Tennessee exercised its discretionary review authority and granted Knoxville's appeal to consider the case. The Supreme Court of Tennessee then affirmed the ruling of the Court of Appeals. Specifically, the Supreme Court of Tennessee agreed with the Court of Appeals that the adult zoning ordinance was unconstitutional.

The Supreme Court of Tennessee then reached the damages issue. The Supreme Court of Tennessee stated,

> "Because the chancery court held that Entertainment Resources had been properly enjoined from operating Fantasy Video pursuant to the ordinance, it did not address Entertainment Resources' damages. We agree with the Court of Appeals that Entertainment Resources is entitled to a determination of damages . . . . We remand to the chancery court to assess the amount of Entertainment Resources' damages and to determine the propriety of awarding attorney's fees."

City of Knoxville v. Entertainment Resources, 166 S.W. 3d 650, 659 (2005), cert.den. 546 U.S. 1061, 163 L.Ed.2d 627, 126 S.Ct. 798 (2005).

The Supreme Court of Tennessee then concluded its opinion with the following statement,

> "Having considered the record and applicable authority, we hold the Knoxville City Code Section 16-468 is vague and unenforceable under the United States and Tennessee Constitutions. We remand to the chancery court for a determination of Entertainment Resources' damages flowing from that court's injunction. . . . "

As can be seen from the discussion above, the decision of the California Supreme Court, which reversed the decision of the California Court of Appeal, is totally at odds with the decisions of the Tennessee appellate courts.

While this Court may be more concerned about splits between the various Federal Circuit Courts of Appeal, this Court should also grant certiorari when there is a conflict among the highest courts of two sovereign states with respect to the application of the Federal Civil Rights Act.

The decision of the California Supreme Court below unnecessarily carves an exception into a duly adopted federal statute that state courts are obligated to enforce under the Supremacy Clause of Article VI of the United States Constitution:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the

land; and the judges in every state shall be bound thereby . . . ."

The California Court of Appeal below recognized that there are no exceptions in the Federal Civil Rights Act. The California Supreme Court, on the other hand, carved an exception into the Federal Civil Rights Act with respect to damages caused by state court injunctions that enforce unconstitutional ordinances. The Tennessee courts did not carve such an exception into the Federal Civil Rights statute.

Likewise, this Court has refused requests to carve exceptions into other federal statutes. If Congress wants to carve exceptions into statutes that it has adopted it should do so and not the judiciary. See F.C.C. v. Nextwave Personal Communications, Inc., 537 U.S. 293, 302, 154 L.Ed.2d 863, 123 S.Ct. 832, 839 (2003) (opinion by Justice Scalia) and Travelers Cas. & Sur. Co., v. Pacific Gas, ___ U.S. ___, 127 S.Ct. 1199 (2007) (opinion by Justice Alito). See also dissenting opinion of Justice Scalia (joined by the Chief Justice and Justices Thomas and Souter)in Zuni Public School Dist., v. Dept. of Educ., ___ U.S. ___, 127 S.Ct. 1534, 1551 (2007), where Justice Scalia wrote, ". . . [T]oday's decision is nothing other than the elevation of judge - supposed legislative intent over clear statutory text. . . ."

Here we have no indication that Congress ever intended to immunize cities from liability under the Civil Rights Act for damages caused by their seeking and obtaining preliminary injunctions to enforce their unconstitutional ordinances. Congress never said that a preliminary injunction issued by a court to enforce

an unconstitutional ordinance adopted by the very city seeking the injunction is an intervening cause that eliminates city liability. Indeed, traditionally a plaintiff who obtains a preliminary injunction but who later loses at trial has to pay the defendant for the damage caused by the preliminary injunction. So, it is highly unlikely Congress intended to exempt cities from liability. The Court of Appeal below relied upon this Court's decision in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) to support its conclusion that a city should be liable for damages caused by a preliminary injunction issued at the request of the city to enforce its own unconstitutional ordinance.

The decision below by the California Supreme Court appears to be inconsistent with the decision of this Court in City of Littleton v. Z.J. Gifts, 541 U.S. 774, 782, 124 S.Ct. 2219, 2225, 159 L.Ed.2d 84 (2004) where this Court stated that the Federal Civil Rights Act would provide a remedy in a case where state court judges (including appellate judges) either take action to violate the First Amendment or by inaction or delay allow the First Amendment to be violated. It is not entirely clear what this Court meant in the City of Littleton v. Z.J. Gifts case with reference to remedies under the Federal Civil Rights Act in the context of its discussion regarding state trial and appellate judges.

2. Certiorari Should Be Granted So This Court May Clarify Its Decision in Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)

Edward Malley was a Rhode Island State Trooper in charge of investigating a drug suspect. Trooper Malley submitted complaints and affidavits to obtain arrest warrants. After the respondents were arrested pursuant to the arrest warrants the case was dropped and the Grand Jury declined to return an Indictment. The respondents then brought an action under the Federal Civil Rights Act, Title 42, United States Code, Section 1983 contending that Trooper Malley violated the Fourth and Fourteenth Amendments. Trooper Malley, the defendant in the Federal District Court case, moved for a directed verdict and that motion was granted by the U. S. District Court. The District Court concluded that the act of the judge in issuing the arrest warrants for the respondents broke the causal chain between Malley's filing of the complaint and respondents' arrests. The District Court also stated that an officer who believes that the facts stated in his affidavit are true and who submits them to a neutral magistrate may thereby be entitled to immunity.

The United States Court of Appeals for the First Circuit reversed, holding that an officer who seeks an arrest warrant by submitting a complaint and supporting affidavit to a judge is not entitled to immunity unless the officer has an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause. This Court granted certiorari in order to review the decision of the First Circuit. This Court affirmed the

judgment of the First Circuit, which had reversed the decision of the District Court.

Trooper Malley was the petitioner in this Court. He had been the defendant in the U.S. District Court. In footnote 7 to this Court's decision in Malley v. Briggs, supra, this Court stated,

> "Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of §1983. As we stated in Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), §1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his action.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983 as recognizing the same causal link."

Manta cited Malley v. Briggs in its briefs filed with the California Supreme Court and during oral argument . Manta relied heavily upon the Malley v. Briggs decision. However, in its initial decision the California Supreme Court ignored Malley v. Briggs in its entirety.

Manta petitioned the California Supreme Court for rehearing and pointed out the omission by the

Supreme Court of any discussion of Malley v. Briggs. Although the California Supreme Court denied Manta's Petition for Rehearing it did file a modification to its initial decision.

In its initial decision the California Supreme Court stated, 43 Cal.4th at 412:

> ". . . [W]e hold that, where a court is provided with appropriate facts to adjudicate a motion for preliminary injunction or a motion for a stay pending appeal, the courts' intervening exercise of independent judgment breaks the chain of causation for purposes of section 1983 liability. We also hold that this general rule of superseding causation does not apply when the judicial officer reached an erroneous decision as a result of being pressured or materially misled as to the relevant facts."

The initial decision of the California Supreme Court read as indicated above. In response to Manta's Petition for Rehearing the California Supreme Court added a footnote at the end of the sentence quoted above. In the footnote the California Supreme Court stated,

> "Our conclusion here is consistent with the United States Supreme Court's comment in Malley v. Briggs (1986) 475 U.S. 335, 344, footnote 7, that section 1983 'should be read against a background of tort liability that makes a man responsible for the consequences of his actions,' and thus judicial action will not constitute a superseding causation when the

party seeking the action provides materially misleading information in its support."

The footnote quoted above which the California Supreme Court added to its opinion is wrong. To the contrary, the conclusion of the California Supreme Court is contrary to, not consistent with, this Court's decision in Malley v. Briggs and, in particular, with this Court's footnote 7 in the Malley v. Briggs case.

In Malley v. Briggs the District Court had stated that the causal chain had been broken but the First Circuit reversed the District Court and this Court affirmed the First Circuit. The California Supreme Court has completely distorted this Court's footnote 7 in Malley v. Briggs.

This Court's decision in Malley v. Briggs, supra, has created some confusion among the lower courts. Also it has been misconstrued. As footnote 7 of the Malley v. Briggs case clearly points out, the District Court had ruled that the chain of causation had been broken but this Court stated that the District Court's "no causation" rationale was inconsistent with this Court's interpretation of section 1983. It is apparent from footnote 7 that this Court found the no causation rationale of the District Court to be inconsistent with this Court's interpretation of Section 1983.

It was bad enough that the California Supreme Court initially ignored this Court's decision in Malley v. Briggs notwithstanding the fact that it was repeatedly cited to the California Supreme Court by Manta. What is worse is the addition of the footnote

by the California Supreme Court. That footnote contradicts this Court's footnote 7 in Malley v. Briggs.

The California Supreme Court is a highly respected Court. Numerous state appellate courts consider California Supreme Court decisions. Accordingly, it is especially important for this Court to grant certiorari to correct this blatant misinterpretation of the Federal Civil Rights Act and blatant misinterpretation of this Court's dictum in Malley v. Briggs, supra.

3. Certiorari Should Be Granted To Determine Whether Or Not A City Should Be Required To Post A Bond When It Seeks And Obtains A Preliminary Injunction To Enforce An Ordinance That Violates The First Amendment

The refusal by the California Supreme Court to consider the related argument that there would have been liability had the City posted a bond in this case is especially disturbing. Moreover, Manta argued in the alternative before the Supreme Court that since it had requested that a bond be posted the judicial system should have treated the case as though a bond had been posted. The issue of the bond is closely related to the issue the California Supreme Court did consider because it demonstrated that with respect to preliminary injunctions absolute liability is the norm. Courts generally require a bond to be posted by a plaintiff who seeks a preliminary injunction if the preliminary injunction is to be granted. The bond protects the defendant against whom the preliminary injunction is issued irrespective of whether the plaintiff who obtains the preliminary injunction misleads the trial court or not. It does not matter. The

law regarding the issuance of preliminary injunctions is unique in this respect. Most court orders including search warrants and arrest warrants do not require bonds to be posted by the officer seeking the warrants. Thus, in those kinds of cases absolute liability is not justified. Here, in contrast, the City obtained a preliminary injunction and refused to post a bond. The California judicial system should have treated the City as though it had posted a bond in order to uphold liability against the City.

In cases involving private parties trial courts routinely require bonds to be posted by plaintiffs who seek and obtain preliminary injunctions pending trial. The purpose of the bond is to protect the defendant by providing the defendant with compensation if it later is determined after trial that the preliminary injunction should not have been granted. Put another way, a defendant who wins at trial is entitled to be compensated for damages caused by an initially issued preliminary injunction. Manta submits that when a city is a plaintiff and seeks to enforce its own unconstitutional ordinance it must be required to post a bond to protect the defendant. In a case such as this where a bond request was made by the defendant Manta Management, the City should be treated as though it did post a bond or, in the alternative, forced to pay damages caused by the preliminary injunction.

Preliminary injunctions are different than wrongfully issued arrest warrants or search warrants. Traditionally preliminary injunctions must be bonded. While it is true that under California law a city is exempt from the requirement that it post a bond when it obtains a preliminary injunction, the exemption

should not operate to insulate the city from liability. The reason cities are exempt from bonding requirements is that they are solvent and therefore there is no need to post a bond. Moreover, in most cases cities are immune from liability under sovereign immunity doctrines. However, when the Civil Rights Act and the First Amendment are involved there should be no exemption and no immunity. The California Supreme Court refused to discuss this issue. It was not discussed by the California Court of Appeal because the California Court of Appeal affirmed the judgment on different grounds.

The California Supreme Court should have remanded the case to the California Court of Appeal to consider the alternative theory of liability pursuant to Manta's argument regarding the bond. Instead of remanding the case to the Court of Appeal to allow that Court to decide the bond issue, the California Supreme Court simply ducked the issue altogether and remanded the matter to the trial court. The bond issue is inextricably intertwined with the civil rights issue. Manta has contended that the Civil Rights Act required the City to post a bond and its refusal to post a bond should not operate to immunize the City from liability.

Since the California Supreme Court refused to discuss the issue and since the California Supreme Court did not remand the matter to the California Court of Appeal for it to discuss the issue, this Court is respectfully requested to grant certiorari, reverse the judgment of the California Supreme Court, and remand the case to that Court with instructions to consider the application of the Federal Civil Rights Act

to the question of whether a city should be compelled to post a bond when it seeks and obtains a preliminary injunction to enforce its own ordinance which violates the First Amendment and whether it should be held liable under the Civil Rights Act if it refuses to post a bond. Put another way, should liability under the Civil Rights Act be absolute when a city refuses to post a bond in a case where a preliminary injunction is obtained to enforce its own ordinance which violates the First Amendment?

CONCLUSION

For the foregoing reasons Petitioner Manta Management respectfully requests this Honorable Court to grant its Petition for Writ of Certiorari to review the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA
En Banc

S144492

Court of Appeal, Fourth Appellate District
Div. 2 - No. E-036942

[Filed June 18, 2008]

MANTA MANAGEMENT CORPORATION, Cross-complainant and Respondent,	)
v.	)
CITY OF SAN BERNARDINO, Cross-defendant and Appellant.	)

The opinion is modified on the court's own motion.

The petition for rehearing is denied.

George, C.J., was absent and did not participate.

Werdegar and Corrigan, JJ., were absent and did not participate.

CHIN
Acting Chief Justice

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA

S144492

Ct.App. 4/2 E036942
San Bernardino County
Super. Ct. No. SCV18157

[Filed June 18, 2008]

MANTA MANAGEMENT CORPORATION,

Cross-complainant and Respondent,

v.

CITY OF SAN BERNARDINO,

Cross-defendant and Appellant.

MODIFICATION OF OPINION

THE COURT:

The opinion herein filed on April 24, 2008, and appearing at 43 Cal.4th 400, is modified as follows:

After the last sentence of the first full paragraph on page 412, a footnote is added stating: "Our conclusion

here is consistent with the United States Supreme Court's comment in *Malley v. Briggs* (1986) 475 U.S. 335, 344, footnote 7, that section 1983 'should be read against a background of tort liability that makes a man responsible for the consequences of his actions,' and thus judicial action will not constitute a superseding causation when the party seeking the action provides materially misleading information in its support."

This modification does not affect the judgment.

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA

No. S144492

Ct.App. 4/2 E036942
San Bernardino County
Super. Ct. No. SCV18157

[Filed April 24, 2008]

MANTA MANAGEMENT CORPORATION,

Cross-complainant and Respondent,

v.

CITY OF SAN BERNARDINO,

Cross-defendant and Appellant.

CHIN, J.

Under federal law, "[l]ocal governing bodies . . . can be sued directly under [Title 42, United State Code] § 1983 for monetary . . . relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (*Monell v. N.Y. City Dept. of Social*

Services (1978) 436 U.S. 658, 690, fn. omitted (*Monell*).)

Here, Manta Management Corporation (Manta) seeks monetary damages against the City of San Bernardino (the city) for lost profits caused by a preliminary injunction and a stay pending appeal that the city sought and that a superior court and a Court of Appeal, respectively, issued. Ultimately, those courts held that the city's ordinance that was the legal basis for the preliminary injunction was unconstitutional. We must decide whether the city is liable under title 42 United States Code section 1983 (section 1983) for lost profits to Manta while the injunction and stay were in effect. We conclude, consistent with analogous federal and state court decisions, that the courts' intervening exercise of independent judgment in issuing the preliminary injunction and stay, though the former was dissolved and the latter was lifted after the ordinance was declared unconstitutional, breaks the chain of causation for purposes of section 1983 liability in the absence of evidence that the city materially misled or pressured the judges who were expected to exercise independent judgment. In this case, where the parties dispute whether material misrepresentations were made to the judges who issued the preliminary injunction and the stay, we reverse the judgment of the Court of Appeal and remand the case for further proceedings on that factual issue.[1]

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[1] Manta argues that the city was required to post an injunction bond and that the judgment of the trial court should be affirmed on the ground that the city refused to post a bond. The bond issues

I. FACTUAL AND PROCEDURAL HISTORY

The facts and procedural discussion are taken largely from the Court of Appeal opinion, supplemented by the entire record in San Bernardino County Superior Court case No. SCV18157.[2]

The City of San Bernardino Municipal Code regulates adult businesses, including adult cabarets. (San Bernardino Mun. Code, § 19.06.030, subd. 2.A.) As relevant here, a zoning ordinance (the ordinance) in effect at the time in question prohibited adult businesses in regional commercial or "CR-3" zones while permitting those businesses to be located in CH (heavy commercial) or IL (light industrial) zones. In 1994, Manta opened a comedy nightclub (the Club) in the city's CR-3 zone, in which nightclubs were a permitted use. Six months after the Club opened, Manta converted it to an adult cabaret called The Flesh Club and began to present "topless entertainment" in place of comedy. Once Manta converted its comedy club to an adult entertainment business, the Club was not in compliance with the city's ordinance in effect at the time, which limited adult businesses to CH and IL zones. On the day that it began operating as an adult cabaret, Manta sued the city in federal court, alleging, inter alia, that the city's

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discussed by the parties are irrelevant to our disposition of the case. We therefore choose not to address them. (Cal. Rules of Court, rule 8.516(b)(3).)

[2] We have taken judicial notice of the entire record in case No. SCV18157, including the appellate records in case Nos. E019635 and E015790.

location limitations were unconstitutionally restrictive.

In January 1995, the city filed an action in state court seeking to enjoin the operation of Manta's cabaret on the ground that it was a public nuisance that violated the city's zoning laws. (Code Civ. Proc., § 731.)[3] In response to the city's ex parte application for a temporary restraining order and order to show cause regarding a preliminary injunction, Manta argued that the initial ordinance violated its free speech rights under article I, section 2 of the California Constitution, "as applied," because it was "unduly restrictive."[4] The superior court issued a temporary restraining order and scheduled a hearing on the motion for a preliminary injunction.

During the hearing on the motion for a preliminary injunction, Manta again contended that the ordinance violated its free speech rights under the California

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[3] In its federal court action, Manta sought a judicial declaration that it had the right to present topless entertainment at its cabaret and a permanent injunction preventing the city from enforcing the ordinance. After the city filed its own action in state court, the city asked the federal court to refrain from deciding its case pending the state court's consideration of the city's request for an injunction. The federal lawsuit ultimately was dismissed on abstention grounds and has no bearing on the issues before this court.

[4] While Manta's federal action was pending, Manta expressly chose not to raise any federal issues in state court because it did not want "to be compelled to litigate federal constitutional issues in state court."

Constitution. The city argued the ordinance was constitutional and asked the trial court "to enforce [it] by means of injunctive relief." The trial court expressed its view that the ordinance's "zone restrictions" were consistent with the city's general plan policy "to control the location of adult businesses based on proximity requirements." It granted the city's motion for a preliminary injunction and ordered Manta to cease adult cabaret performances at the Club. In so doing, the trial court stated that the city "has established that its likelihood of prevailing on the merits is strong." The court noted that allowing the Club to continue as an adult business "could cause as much harm to the surrounding businesses as to any subjective harm to the adult entertainment business as projected by [Manta]." The court expressly chose to abate the challenged activity on a showing that Manta violated the local zoning ordinance rather than allow the activity to continue during the "judicial process which can take up to ten years" to litigate the constitutionality of the underlying ordinance. It added that the Club could resume operation as a comedy club because the injunction only restricted operation as an adult business.

In November 1995, while Manta's appeal from the order granting the preliminary hearing was pending, Manta filed a cross-complaint in the trial court. That complaint included, in addition to state causes of action that were eventually dismissed, a cause of action in which Manta sought monetary relief pursuant to section 1983 based on its allegation that the ordinance and actions of the city violated Manta's federal civil rights.

One year later, after a nonjury trial, the trial court dissolved the preliminary injunction after ruling the city's ordinance an unconstitutional infringement on Manta's First Amendment right to free speech as applied to Manta's cabaret because it "neither serve[d] a substantial governmental interest nor allow[ed] for reasonable alternative avenues of communication." The city appealed and moved for a stay pending appeal. In response, the Court of Appeal issued a writ of supersedeas (the stay) that prevented Manta from "operating as an adult business" pending resolution of the appeal. It dismissed as moot Manta's appeal from the order granting the preliminary injunction.

Approximately two years later, on January 26, 1999, the Court of Appeal lifted its stay after we denied review of its opinion affirming the trial court's order dissolving the preliminary injunction.[5]

In 2000, the parties agreed to a non-jury trial on the issue of the city's liability under section 1983 and a separate trial on damages. In the liability phase, the trial court ruled that the acts of "precipitating" the preliminary injunction and stay were an effort to enforce an unconstitutional zoning ordinance. It held that those acts violated Manta's federally protected rights and constituted a basis for section 1983 liability. On the other hand, the court did not find that the city's ordinance itself was a basis for section 1983 liability. A jury awarded Manta $1.4 million in damages for profits lost while subject to the injunction and the stay.

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[5] *People v. Manta Management Corp.* (Jan. 26, 1999, E019635) (nonpub. opn.) review denied April 21, 1999, S062091 (*Manta*).

The city appealed and argued that it could not be liable for damages under section 1983 because it had sought redress through the courts. The Court of Appeal affirmed the judgment obtained under section 1983. It held that the city's act of obtaining an injunction to enforce an unconstitutional ordinance is an act in violation of the First Amendment within the meaning of section 1983, and that, accordingly, "a city is liable for damages under section 1983 if it chooses to enforce an unconstitutional ordinance by means of a preliminary injunction." The Court of Appeal concluded that "the city's good faith reliance on the trial court's issuance of the preliminary injunction does not provide it with immunity." We granted review.

II. DISCUSSION

As relevant here, section 1983 provides that "[e]very person who, under color of any . . . ordinance . . . of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

As noted above, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary . . . relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (*Monell, supra,* 436 U.S. at p. 590, fn. omitted.) Section

1983 was enacted to provide compensation "to those deprived of their federal rights by state actors," a category that includes cities and other local governments. (*Felder v. Casey* (1988) 487 U.S. 131, 141; see also *Monell, supra,* 436 U.S. at p. 690.) In particular, cities are liable for damages resulting from their actions that cause an infringement of free speech as protected under the First Amendment to the federal Constitution. (See, e.g., *Gerritsen v. City of Los Angeles* (9th Cir. 1993) 994 F.2d 570, 575-578, cert. den. (1993) 510 U.S. 915 [city's enforcement of an unconstitutional ordinance restricting handbill distribution supported a § 1983 action for monetary damages].)

"'Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred."' [Citations.]" (*County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 297.) Although section 1983 is silent as to what remedies are available to those suing for a violation of their civil rights, the United States Supreme Court has held that monetary damages are available under that section for actions that have violated federal "'constitutional rights and . . . have caused compensable injury . . . .' [Citation.]" (*Carey v. Piphus* (1978) 435 U.S. 247, 255, italics omitted.) Thus, a city may be sued for monetary relief under section 1983 if it *unconstitutionally implements* an ordinance adopted by its officers. "Because section 1983 does not comprehensively dictate the procedures and remedies applicable to actions brought under it, a state court ordinarily applies state law in adjudicating those actions. The supremacy clause of the federal Constitution, however, prohibits a state court from applying state law that is inconsistent with federal

law. [Citations.]" (*County of Los Angeles v. Superior Court, supra,* 21 Cal.4th at p. 298.)

The proper analysis of a section 1983 claim against a municipality requires the examination of two interrelated issues, namely, "(1) whether plaintiff's harm was caused by a [federal] constitutional violation, and (2) if so, whether the city is responsible for that violation." (*Collins v. Harker Heights* (1992) 503 U.S. 115, 120.) "[T]he fact that a § 1983 claimant has demonstrated a violation of [his or] her federally protected rights under color of state law does not necessarily mean that a named defendant will be found liable under § 1983. The liability of a § 1983 defendant depends upon (1) the rules governing culpability and responsibility, including principles of causation and the rule against respondeat superior liability; (2) whether individual or governmental liability is at issue; and (3) the available immunities from liability." (Schwartz, Section 1983 Litigation: Claims and Defenses (Aspen Pub. 4th ed. 2003) § 6.01, p. 6-3.) Of the three major issues concerning culpability and responsibility, one is relevant here, namely, "[t]he issue of causation: how closely related a defendant's action or inaction must be to the alleged injury . . . ." (*Ibid.*) On the issue of causation, "[f]ederal courts turn to the causation factors developed in the common law of torts to supply the necessary causation factor in the civil rights field." (*Stevenson v. Koskey* (9th Cir. 1989) 877 F.2d 1435, 1438.)

In the case before us, we assume, without deciding, that the city's ordinance as written violated Manta's First Amendment right to free speech because the Court of Appeal affirmed the trial court's decision to

dissolve the preliminary injunction on First Amendment grounds and we denied review of that decision in *Manta, supra,* E019635. However, the ordinance caused Manta no harm because Manta did not abide by it. Manta suffered no monetary damages until the trial court enjoined its operating an adult cabaret where its comedy club had been located. The issue before us is whether the city's *act of seeking an injunction* to enforce the ordinance dealing with the location of adult businesses and its subsequent *act of filing a petition for writ of supersedeas* to obtain a stay pending appeal "caused" the harm suffered by Manta to the extent that the city is liable for damages Manta incurred during the 53 months the injunction and the stay were in place.

In support of its judgment affirming Manta's damage award against the city, the Court of Appeal focused on whether the city was *immune from liability* because it had relied in good faith "on a preliminary injunction duly issued by a trial court." It relied upon the holding in *Owen v. City of Independence* (1980) 445 U.S. 622, that "municipalities have no immunity from damages liability flowing from their constitutional violations" (*id.* at p. 657), as the basis for its conclusion that the city's act of obtaining an injunction to enforce an unconstitutional ordinance is an act in violation of the First Amendment within the meaning of section 1983, and that "the city's good faith reliance on the trial court's issuance of the preliminary injunction does not provide it with immunity."

However, the critical question is not whether the city is immune from liability, but whether the city's seeking a preliminary injunction and a stay were *acts*

in violation of the First Amendment that *caused* injury to Manta for which the city could conceivably be liable under section 1983. The question of immunity would only become relevant if the defendant caused the harm. Indeed, the city does not assert immunity in this case. Instead, it questions "whether there is any initial liability under federal law" for its actions in obtaining a preliminary injunction and stay. In response, Manta argues that the city caused the constitutional violation because the courts would not have issued the overbroad injunction and the stay unless the city had requested them; Manta claims the city is liable for its damages because the courts were enforcing the unconstitutional ordinance "at the City's request."

Cities have been found liable for damages based on official action to enforce an ordinance later determined to be unconstitutional in a variety of contexts. (See, e.g., *RK Ventures, Inc. v. City of Seattle* (9th Cir. 2002) 307 F.3d 1045, 1050-1063 [plaintiff could maintain § 1983 action for damages resulting from prosecution of civil abatement action based on an unconstitutional ordinance]; *Grossman v. City of Portland* (9th Cir. 1994) 33 F.3d 1200, 1203-1210 [city liable for arrest pursuant to an unconstitutional ordinance]; *Gerritsen v. City of Los Angeles, supra,* 994 F.2d at pp. 575-578, 580 [city's enforcement of unconstitutional ordinance restricting handbill distribution supported § 1983 action for monetary damages]; *Murray v. City of Sioux Falls* (8th Cir. 1989) 867 F.2d 472, 474, fn. 2. [acknowledged that a city may be liable for damages resulting from an arrest or criminal prosecution pursuant to an ordinance later found unconstitutional]; *AAK, Inc. v. City of Woonsocket* (D.R.I. 1993) 830 F.Supp. 99, 100-101, 105 [imposition

of higher licensing fee on an adult cabaret than on similar entertainment businesses supported claim for monetary damages]; *Pesticide Public Policy v. Village of Wauconda, Ill.* (N.D.Ill. 1985) 622 F.Supp. 423, 433-434 [enforcement of invalid ordinance regulating pesticide use supported claim for damages]; *Negin v. City of Mentor, Ohio* (N.D.Ohio 1985) 601 F.Supp. 1502, 1505 [city liable for damages resulting from unconstitutional application of zoning ordinance].) Significantly, however, none of the cases cited above involved a situation in which a court sanctioned the city's enforcement of its ordinance before the ordinance was found to be unconstitutional.

More closely analogous to our case is *Townes v. City of New York* (2d Cir. 1999) 176 F.3d 138 (*Townes*). There, the plaintiff's section 1983 complaint alleged that he was subjected to an unconstitutional stop and search by the defendant police officers while he was a passenger in a taxicab. The plaintiff moved to suppress the evidence found during that search in state criminal proceedings, but the motion was denied. He was convicted based on that evidence, but the conviction was overturned by a state appellate court on the ground that the evidence should have been suppressed because it was obtained in violation of the plaintiff's Fourth Amendment rights. The plaintiff did not seek damages "for [the] specific invasions of his privacy, but rather for injuries derivative of these invasions—his arrest, conviction, and incarceration." (*Id.* at p. 141.) While agreeing that the stop and search had violated the plaintiff's Fourth Amendment rights (*id.* at p. 144), the Second Circuit held that the alleged injuries were not "fairly traceable to the actual violations of his civil rights." (*Id.* at p. 141.) It held that the "state trial

court's exercise of independent judgment in deciding not to suppress the evidence, though later ruled to be erroneous, broke the chain of causation for purposes of § 1983 liability for the plaintiff's conviction and incarceration." (*Id.* at p. 147.) The court relied on the "well settled" principle "that the chain of causation between a police officer's unlawful arrest and subsequent conviction and incarceration is broken by the intervening exercise of independent judgment . . . in the absence of evidence that the police officer misled or pressured the official who could be expected to exercise independent judgment." (*Ibid.*, citations omitted.) After noting that there was no claim of such evidence, the court held that plaintiff Townes could not recover damages for his conviction and incarceration from the police officers who handled the stop and search. (*Ibid.*)

Recently, the Second Circuit revisited the traditional tort concept of independent intervening cause when considering whether the petitioner could establish a claim against an officer for the erroneous admission at trial of testimony regarding an unduly suggestive identification. (*Wray v. City of New York* (2d Cir. 2007) 490 F.3d 189.) Using language similar to that in its *Townes* decision, the court ruled that "extending liability to [the officer] is unprecedented and unwarranted. In the absence of evidence that [the officer] misled or pressured the prosecution or trial judge, we cannot conclude that his conduct caused the violation of Wray's constitutional rights; rather, the violation was caused by the ill-considered acts and decisions of the prosecutor and trial judge." (*Id.* at p. 193.)

Another federal case in which the defendant's conduct was followed by a court's exercise of independent judgment is *Egervary v. Young* (3d Cir. 2004) 366 F.3d 238 (*Egervary*). In that case, government officials, as well as attorneys, urged a federal district court to make a particular decision. The judge made that decision, which ultimately turned out to be erroneous. In deciding whether the government officials were liable for section 1983 damages suffered by the plaintiffs as a result of the judge's decision, the Third Circuit applied common law tort causation principles in concluding that "an intervening act of a third party, which actively operates to produce harm after the first person's wrongful act has been committed, is a superseding cause which prevents the first person from being liable for the harm which his antecedent wrongful act was a substantial factor in bringing about." (*Egervary, supra,* 366 F.3d at p. 246, citing Rest.2d Torts § 440-441; see also *McCabe v. Ernst & Young, LLP* (3d Cir. 2007) 494 F.3d 418, 436.) With regard to the specific factual situation before it, the court held that, "where, as here, the judicial officer is *provided with the appropriate facts to adjudicate the proceeding* but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 . . . liability." (*Egervary, supra,* 366 F.3d at pp. 250-251, italics added.) Citing *Townes,* the circuit court similarly exempted from its general holding instances in which the judicial officer reached an erroneous decision as a result of being misled as to the relevant facts. (*Id.* at p. 250.) The court added that its conclusion was "not inconsistent with" the holding in *Lanier v. Sallas* (5th Cir. 1985) 777 F.2d 321, 324-325,

that "a judge's decision to commit plaintiff to a mental health facility did not sever the chain of causation where that decision was based in part on a misrepresentation made by defendants." (*Egervary, supra,* 366 F.3d at p. 249.)

The Fifth Circuit reached a similar result in *Murray v. Earle* (5th Cir. 2005) 405 F.3d 278. There, a plaintiff juvenile sought damages under section 1983 from defendant detectives. The juvenile alleged that a confession coerced from her by the detectives was improperly admitted into evidence in his delinquency proceeding, in violation of the Fifth Amendment privilege against self-incrimination and that the violation of her civil rights caused "her later-reversed conviction (and lengthy incarceration) for injury to a child." (*Murray v. Earle,* at p. 282.) The court acknowledged the "fundamental tension" between two "primary tenets of tort law: (1) An individual is liable for reasonably foreseeable consequences of his actions, and (2) an intervening decision of an informed, neutral decision-maker 'breaks' the chain of causation." (*Id.* at p. 292.) It then held that the trial judge's ruling, albeit an incorrect one, to admit the confession "constituted a superseding cause of [the plaintiff's] injury, relieving the defendants of liability under § 1983." (*Id.* at p. 293.) The court reasoned that, "as in the analogous context of Fourth Amendment violations, an official who *provides accurate information to a neutral intermediary,* such as a trial judge, cannot 'cause' a subsequent Fifth Amendment violation arising out of the neutral intermediary's decision." (*Ibid.,* italics added; see also *Shields v. Twiss* (5th Cir. 2004) 389 F.3d 142, 150 [placing facts supporting an arrest before an independent intermediary breaks the chain

of causation unless plaintiff affirmatively shows the intermediary's deliberations were tainted by actions of the defendant].)

In *Jones v. Cannon* (11th Cir. 1999) 174 F.3d 1271, 1287, the court similarly held that "the grand jury indictment broke the chain of causation for the detention from the alleged false arrest . . . . [Citation.] The intervening acts of the prosecutor in presenting the murder case to the grand jury and of the grand jury returning the indictment broke the chain of causation for any detention of Jones that followed the grand jury indictment."

A sister state court considered questions similar to those before us. After distinguishing its case from those in which factual misrepresentations or misconduct misled the court issuing the injunction, the Michigan court concluded that "[t]he direct 'cause' of the [First Amendment] violation here was the court's issuance of the overbroad injunction, not plaintiff's pursuit thereof." (*Mayor of Lansing v. Knights of the Ku Klux Klan* (Mich.App. 1997) 564 N.W.2d 177, 180 (*Mayor of Lansing*).)

We note that, in our state, in a context other than § 1983 litigation, the Court of Appeal found the exercise of independent judgment by a court constitutes an independent superseding cause. (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024.) In that case, according to the plaintiff's complaint and reasonable inferences from its allegations, Teano negligently and recklessly drove his car so that it repeatedly collided with a car driven by Brewer. Fearful that he would be assaulted by Teano if he stopped, Brewer left the

scene. A bystander saw him leave the accident scene and contacted the police. Brewer was arrested for hit-and-run. Brewer stood trial for felony hit and run and was acquitted. He then sued the estate of Teano, who had died, seeking compensation for damage to his car, for physical injury and emotional distress, and for expenses incurred as a result of the arrest and prosecution. (*Id.* at p. 1027.) Relying on the Restatement Second of Torts,[6] the appellate court concluded that "the decision of the prosecutor to file felony charges against plaintiff, and of the magistrate to hold him to answer those charges, were superseding acts for which Teano's estate is not liable." (*Brewer, supra,* 40 Cal.App.4th at p. 1027.) After noting the multiple separate steps that led to the prosecution of a criminal trial, the court concluded that "it cannot be said that the intervening force consisting of the prosecution of formal criminal charges against plaintiff was 'foreseeable' from Teano's conduct, however characterized. The harm from that proceeding was different in kind from that which may be expected to result from the kind of conduct alleged in this case. ([Restatement Second of Torts] § 442, com. (a).) It is an extraordinary rather than a normal result of Teano's act. (*Id.,* com. (b).) The decision of prosecutors to file against plaintiff, and of the magistrate or grand jury to hold him to answer on felony charges, operated independently from anything that Teano did; they

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[6] The Restatement Second of Torts, section 440, defines a superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

cannot be described as a normal result of his negligent driving. (*Id.*, com. (c).)" (*Id.* at p. 1037.)

We find the reasoning in the above federal and state cases that have analyzed similar factual situations in terms of independent superseding causation to be persuasive. We also agree with those cases that find an exception to the principle of superseding causation when the party seeking an injunction or stay pending appeal either misled or pressured the court, which was expected to exercise independent judgment. Accordingly, we hold that, where a court is provided with appropriate facts to adjudicate a motion for preliminary injunction or a motion for a stay pending appeal, the courts' intervening exercise of independent judgment breaks the chain of causation for purposes of section 1983 liability.[7] We also hold that this general rule of superseding causation does not apply when the judicial officer reached an erroneous decision as a result of being pressured or materially misled as to the relevant facts.

The city contends the only exception to the rule that exercise of independent judgment by the court breaks the chain of causation "is if material facts are either *intentionally* misstated or *intentionally* withheld," and it claims that *Mayor of Lansing* recognized an exception to the rule if the party seeking an injunction "intentionally misled the court." To the contrary, *Mayor of Lansing*, consistent with other

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[7] To the extent that *Gill v. Epstein* (1965) 62 Cal.2d 611, 617-618, held to the contrary, it is disapproved.

cases on the issue of superseding intervening cause, held that the court's exercise of independent judgment broke the chain of causation because the section 1983 defendants did not engage in any wrongdoing and because they "did not make misrepresentations that would have undermined the trial court's ability to perform its adjudicative function or to exercise its discretion." (*Mayor of Lansing, supra,* 564 N.W.2d at p. 183.) *Newman v. County of Orange* (9th Cir. 2006) 457 F.3d 991, also cited by the city, similarly recognizes that a plaintiff can produce evidence of material omissions or conflicting evidence to rebut a presumption that a court or prosecutor exercised independent judgment. (*Id.* at p. 993-994.) In fact, the majority of cases that discuss the exception to the break in the chain of causation do not focus on whether the party seeking the injunction *intentionally* misled the official who could be expected to exercise independent judgment. They hold, instead, that the chain of causation is broken by the intervening exercise of independent judgment in the absence of evidence that the party seeking the injunction misled or pressured the official, or did not provide him or her with the appropriate facts to adjudicate the proceeding. (See *Townes, supra,* 176 F.3d at p. 147; *Egervary, supra,* 366 F.3d at pp. 250-251.) After reviewing analogous federal and state cases that discuss the principle of superseding causation and its exception, we conclude Manta does not need to prove that the city's failure to provide the court with accurate information was intentional. Instead, Manta needs to show only that the misrepresentations were material, in that they would have undermined the courts' ability to exercise independent judgment on the issues presented.

On the record before us, we cannot determine whether the principle of superseding causation or its exception applies in this case. The parties agree that declarations submitted by the city in support of its request for a preliminary injunction contained misinformation regarding the number of sites and acres within the city on which adult entertainment businesses could operate under the city's ordinance in effect at the time Manta converted its comedy club to an adult cabaret, and Manta asserts that in support of the issuance of a writ of supersedeas, the city misrepresented to the appellate court that Manta would suffer no irreparable harm because it had a damage remedy. The parties dispute whether some of the factual misstatements were actually misleading and whether any misrepresentations that were made were material in that they "would have undermined the trial court's ability to perform its adjudicative function or to exercise its discretion." (*Mayor of Lansing, supra,* 564 N.W.2d at p. 183.)

As noted above, here, unlike the circumstances in *Townes, supra,* 176 F.3d at page 147, there is a claim that the city made material misrepresentations regarding the factual basis upon which the preliminary injunction and the writ of supersedeas depended. We remand the matter to allow the trial court to resolve any relevant factual issues and to apply the principles of superseding intervening causation in the first instance. (See, e.g., *Zengen, Inc. v. Comerica Bank* (2007) 41 Cal.4th 239, 259; *People v. Cahill* (1993) 5 Cal.4th 478, 510.)

III. DISPOSITION

For the reasons stated above, we reverse the judgment of the Court of Appeal, and remand the cause to that court with directions to remand it in turn to the superior court with directions to conduct proceedings consistent with the views expressed herein.

CHIN, J.

WE CONCUR:

GEORGE, C.J.
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
MORENO, J.
CORRIGAN, J.

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

No. E036942
(Super.Ct.No. SCVSS18157)

[Filed May 11, 2006]
As Modified on Denial of Rehearing June 2, 2006

MANTA MANAGEMENT CORPORATION,

Cross-complainant and Respondent,

v.

CITY OF SAN BERNARDINO,

Cross-defendant and Appellant.

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

Arias, Lockwood & Gray, Arias Aaen, Joseph Arias, Riverside, Christopher D. Lockwood and Laura Tall Liu, San Bernardino, for Cross-defendant and Appellant.

Roger Jon Diamond, for Cross-complainant and Respondent.

OPINION

McKINSTER, Acting P.J.

INTRODUCTION

The City of San Bernardino (the city) appeals from a judgment in the amount of $1.4 million, representing damages incurred by Manta Management Corporation (Manta) as a result of a preliminary injunction the city obtained to enforce a zoning ordinance prohibiting Manta's operation of an adult cabaret. The preliminary injunction was dissolved after this court upheld the trial court's ruling which declared the zoning ordinance unconstitutional, and the California Supreme Court denied review.

The city contends that damages are available for a wrongfully issued preliminary injunction only if a bond has been posted or if the party wrongfully enjoined prevails in a separate action for malicious prosecution. Manta contends that the trial court correctly found that it is entitled to recover damages resulting from the injunction, despite the absence of an injunction bond, via its cross-complaint for violation of its civil rights pursuant to section 1983 of title 42 of the United States Code.

The city also contends that the award of damages is not supported by substantial evidence because there was no factual basis for separating legal profits from profits derived from illegal activities (i.e., prostitution),

and that the trial court improperly placed the burden of identifying "each dollar derived from prostitution" on the city. Finally, it contends that because a large portion of Manta's profits are derived from activities which violated a city ordinance, the court erred in excluding any evidence concerning the ordinance.

We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The following background is derived from the record in an appeal in a related action (*People v. Manta Management Corp.* (Jan. 26, 1999, E019635) [nonpub. opn.]), and from the record in the present appeal.

In November of 1993, the city issued Manta a conditional use permit for the operation of a nightclub to feature live entertainment and dancing at a location on Hospitality Lane. The nightclub site is located in a regional commercial, or "CR-3," zone. Under the city's zoning ordinances as codified in its "Development Code," title 19 of its municipal code, nightclubs are permissible land uses in CR-3 zones. (San Bernardino Mun.Code (SBMC), § 19.06.010, subd. 2.K.) Manta commenced operation of its nightclub in June of 1994, featuring stand-up comedy acts. At the time, the club was called The Rocket Theater.

Among the land uses regulated by the city's code are adult businesses. (SBMC, § 19.06.030, subd. 2.A.) One of the business activities classified as an adult business is that of an "adult cabaret." (*Id.*, subd. 2.A.3.) An adult cabaret is defined as a nightclub

which regularly features live performances in which the performers display specified anatomical areas or engage in specified sexual activities. (*Ibid.*)

Under the code, adult businesses are not allowed in CR-3 zones. (SBMC, § 19.06.030, subd. 2.A.) Nevertheless, on November 14, 1994, Manta began featuring topless female dancers in its nightclub, thereby converting it into an adult cabaret. It was renamed The Flesh Club.

The zoning provisions of the city's code were adopted in 1991 and periodically amended thereafter. At the time Manta initiated the operation of an adult cabaret, the most recent amendment of the zoning provisions regulating adult businesses was ordinance No. MC-909, adopted in August of 1994. Section 19.06.030, subdivision 2.A., as amended by ordinance no. MC-909, is hereafter referred to as the "initial ordinance."

The initial ordinance severely limits the locations at which adult businesses can be operated in the city. Adult businesses are allowed only in CH (commercial heavy) and IL (industrial light) zones. Moreover, adult businesses cannot be established "within 2[,]000 feet of another such business or within 1 [,]000 feet of any religious institution, school or public park within the city or within 1[,]000 feet of any property designated for residential use or used for residential purposes." Distances between adult businesses are measured on a straight line, building to building. Distances between adult businesses and the other specified uses are measured in a straight line, property line to property line. Manta's location complied with the distance

limitations, but not with the provision restricting adult cabarets to CH and IL zones.

On the same day that it started to operate the nightclub as an adult cabaret, Manta sued the city in federal court, alleging inter alia that the location limitations are unconstitutionally restrictive. The action sought both a judicial declaration that it has the right to present topless entertainment at its nightclub, and a permanent injunction preventing the city from enforcing the initial ordinance.

In January of 1995, while the federal action was pending, the city attorney brought an action in the name of the People of the State of California (Code Civ. Proc., § 731), alleging the operation of Manta's adult cabaret constitutes a public nuisance, and seeking to abate the alleged nuisance through preliminary and permanent injunctions. Thereafter, the city convinced the district court to abstain from deciding the same issue pending in the state court by dismissing the federal action.

In February of 1995, the city amended its action by adding a claim for civil penalties for engaging in unlawful business practices. (Bus. & Prof. Code, §§ 17200 & 17206.) That same month, the trial court (Hon. Duane M. Lloyd) granted the city's motion for preliminary injunction and ordered Manta to cease performances of the type characterizing adult cabarets.

Manta appealed from the order granting the preliminary injunction. While that appeal was pending, Manta cross-complained against the city for declaratory relief and damages. The cross-complaint

included several state causes of action and a cause of action alleging that the "ordinances and code provisions and actions" of the city violated its civil rights under the federal and state constitutions, and sought relief pursuant to section 1983 of title 42 of the United States Code.

Trial commenced in July of 1996 before the Hon. Carl Davis. The trial court bifurcated the issues, ruling that the issue of whether the preliminary injunction should be dissolved or made permanent would be tried before any damage issues. During the trial on the injunction issue, the city adopted an urgency ordinance, No. MC-977, which further amended the provisions of its code governing adult businesses by slightly enlarging the areas in which adult businesses could be located.

Following a lengthy nonjury trial, the trial court ruled that the initial ordinance was constitutionally invalid because it neither served a substantial governmental interest nor allowed for reasonable alternative avenues of communication. It also found that the constitutionality of the code, as amended by ordinance No. MC-977, was irrelevant because Manta had established a prior nonconforming use before ordinance No. MC-977 was adopted. Accordingly, it dissolved the preliminary injunction.

The city appealed from the order dissolving that injunction. In response to the city's petition for writ of supersedeas, we stayed the trial court's order. On our own motion, we dismissed as moot Manta's appeal from the order granting the preliminary injunction. We concluded that the trial court correctly determined

that the zoning ordinances violated Manta's First Amendment right of expression and affirmed the trial court's order dissolving the injunction. We also lifted the stay imposed by our writ of supersedeas.

Following the issuance of our opinion in *People v. Manta Management Corp., supra,* E019635, the city filed a motion for judgment on the pleadings. The court denied the motion, holding that the cross-complaint was not based "solely on injunctive relief remedies," but instead on "a separate and distinct action for violation of constitutional rights . . . through the issuance of unconstitutionally vague ordinances designed to thwart those rights." The city's subsequent motion for summary adjudication of issues was granted as to all causes of action except the civil rights cause of action. The court found that it was undisputed that Manta did not claim any damages except those caused by the preliminary injunction and the writ of supersedeas.

The parties agreed to hold a two-step trial, first to determine liability and second to determine damages. Prior to the commencement of the bench trial, Manta filed an amended cross-complaint, alleging only the civil rights violation.

In the liability phase, the court (Hon. Donald R. Alvarez) found that the act of requesting and obtaining the preliminary injunction and the stay pending appeal constituted a basis for liability under section 1983 of title 42 of the United States Code (hereafter section 1983). In the subsequent trial on damages, the

jury awarded Manta $1.4 million in damages for lost profits.[1]

Following denial of its motions for judgment notwithstanding the verdict and for a new trial, the city filed a timely notice of appeal.

DISCUSSION

THE CITY'S ACT OF OBTAINING AN INJUNCTION TO ENFORCE AN UNCONSTITUTIONAL ORDINANCE IS AN ACT IN VIOLATION OF THE FIRST AMENDMENT WITHIN THE MEANING OF SECTION 1983

Introduction

Under most circumstances, if a preliminary injunction is dissolved as having been improperly granted, the formerly enjoined party may recover damages only by proceeding against the injunction bond or surety. If no bond was required as a condition of issuance of the preliminary injunction, or if the amount of the bond was insufficient to compensate the enjoined party, the party may recover his damages only if he can prevail in an independent action for malicious prosecution, i.e., by showing that the injunction was obtained maliciously and without probable cause. This is true both under California's statutory scheme relating to injunctions and under federal law. (*Dickey v. Rosso* (1972) 23 Cal.App.3d 493, 497-498, 100 Cal.Rptr. 358; *Coyne-Delany Co.*,

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[1] Facts pertaining to the damages issues will be discussed below.

Inc. v. Capital Development Bd. of State of Ill.(7th Cir. 1983) 717 F.2d 385, 393 (*Coyne-Delany*).)

Because cities are exempt from the requirement of posting a bond as a condition of issuance of a preliminary injunction (Code Civ. Proc., § 995.220; *City of South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 Cal.App.4th 916, 920-922, 14 Cal.Rptr.2d 323), the city did not post an injunction bond. On appeal, it argues that because there was no bond, it cannot be liable to Manta on its cross-complaint for damages from the injunction and the stay on appeal (hereafter referred to collectively as the injunction) because Manta did not include a cause of action for malicious prosecution in its cross-complaint.

The trial court found, however, that the acts of seeking and obtaining the injunction were an effort to enforce the unconstitutional zoning ordinance and thus subjected the city to liability under section 1983 as a violation of Manta's First Amendment rights. For that reason, it found that Manta's right to damages was independent of the normal remedies for wrongful issuance of an injunction. On appeal, the city contends that it is not a violation of the First Amendment to seek redress through the courts and that it cannot be liable for damages under section 1983 on that basis.

Standard of Review

The pertinent facts are undisputed, and we therefore independently review the issue as a question of pure law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799, 35 Cal.Rptr.2d 418, 883 P.2d 960.)

Discussion

We address first the city's contention that it cannot be liable for damages under section 1983 based on its action of seeking to enforce its unconstitutional ordinance by means of a preliminary injunction.

As relevant to this case, section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." Section 1983 was enacted specifically to provide compensation "to those deprived of their federal rights by state actors." (*Felder v. Casey* (1988) 487 U.S. 131, 141, 108 S.Ct. 2302, 101 L.Ed.2d 123.) Monetary damages are available under section 1983 for "actions 'found . . . to have been violative . . . of constitutional rights and to have caused compensable injury.' [Citation.]" (*Carey v. Piphus* (1978) 435 U.S. 247, 255, 98 S.Ct. 1042, 55 L.Ed.2d 252, italics omitted.)

Local governments, including cities, are "state actors" within the meaning of section 1983. (*Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 *(Monell); Felder v. Casey, supra,* 487 U.S. at p. 139, 108 S.Ct. 2302.) Thus, a city may be sued for "monetary, declaratory or injunctive relief" under section 1983 if it "unconstitutional[ly] implements or

executes a policy statement, *ordinance,* regulation, or decision officially adopted and promulgated by [the city's] officers." (*Monell,* at p. 690, 98 S.Ct. 2018 italics added.)

"Implementation" of an ordinance necessarily includes official action to enforce it. Thus, a city is liable for damages which result from an arrest or criminal prosecution pursuant to an ordinance which is later determined to be unconstitutional. (*Grossman v. City of Portland* (9th Cir. 1994) 33 F.3d 1200, 1203-1210; *Murray v. City of Sioux Falls* (8th Cir. 1989) 867 F.2d 472, 474, fn. 2.) Cities are also liable for damages resulting from civil actions brought to enforce unconstitutional ordinances. In *RK Ventures, Inc. v. City of Seattle* (9th Cir. 2002) 307 F.3d 1045, the Ninth Circuit held that the plaintiff could maintain a section 1983 action for damages resulting from prosecution of a civil abatement action based on an unconstitutional ordinance. (*Id.* at pp. 1050-1063.) In *Gerritsen v. City of Los Angeles* (9th Cir. 1993) 994 F.2d 570, 575-578, 580, certiorari denied (1993) 510 U.S. 915, 114 S.Ct. 306, 126 L.Ed.2d 253, the same court held that a city's enforcement of an unconstitutional ordinance restricting handbill distribution supports a section 1983 action for monetary damages. Other courts have applied section 1983 to civil enforcement of unconstitutional ordinances in a variety of contexts. (See *AAK, Inc. v. City of Woonsocket* (D.R.I. 1993) 830 F.Supp. 99, 100-101, 105 [imposition of a higher licensing fee on an adult cabaret than on other similar entertainment businesses supports claim for monetary damages]; *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.* (N.D.Ill. 1985) 622 F.Supp. 423, 433-434 [enforcement of invalid ordinance

regulating use of pesticide supports claim for damages]; *Negin v. City of Mentor, Ohio* (N.D.Ohio 1985) 601 F.Supp. 1502, 1505 [city is liable for damages resulting from unconstitutional application of zoning ordinance].)

None of these cases, nor any others we have found, involves a situation similar to this case, in which the city's enforcement of its ordinance was sanctioned by a court before the ordinance was found to be unconstitutional. During oral argument, it was suggested that the city is immune from liability because it enforced the ordinance in good faith reliance on an injunction duly issued by the trial court.[2] We have found no cases which are directly on point.[3]

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[2] In a similar vein, the city contends that it cannot be liable for damages resulting from the preliminary injunction in the absence of a showing that it acted maliciously. However, the cases the city relies on in support of that contention do not involve claims arising under section 1983. Malice is not an element of a section 1983 claim based on enforcement of an unconstitutional ordinance: As we discuss below, a city is liable for damages resulting from its enforcement of an unconstitutional ordinance even if it acts in good faith.

[3] In *Dennis v. Sparks* (1980) 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (*Dennis*), the United States Supreme Court accepted, without discussion, that if a state actor is involved in the procurement of an injunction which violates the constitutional rights of the party enjoined, section 1983 may be invoked in an action for damages resulting from the injunction. However, *Dennis* is factually distinct from this case. In *Dennis*, the plaintiffs brought an action for damages under section 1983 against a state court judge and other individuals who allegedly conspired to bribe the judge to issue an injunction prohibiting the plaintiffs from

However, we conclude that the city's good-faith reliance on the trial court's issuance of the preliminary injunction does not provide it with immunity.

In *Owen v. City of Independence, Mo.* (1980) 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (*Owen*), the United States Supreme Court addressed the question whether section 1983 affords qualified immunity to a municipality if the city official or employee responsible for the unconstitutional action would be entitled to such immunity, i.e. if the official or employee was acting in good faith, based on an objectively reasonable belief that his or her conduct was lawful. (See *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818, 819, 102 S.Ct.

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producing minerals from certain oil leases, thus depriving the plaintiffs of property without due process of law. The defendants moved for dismissal, arguing that the judge was immune from damages for his official, albeit corrupt, acts, and that his dismissal from the action compelled the conclusion that the remaining defendants did not act under color of law. (*Dennis,* at pp. 25-26, 101 S.Ct. 183.) The Supreme Court held that although the judge was immune from damages because he acted within his official capacity, his intentional involvement in a conspiracy to obtain an injunction by corrupt means constituted state action, and the private parties who conspired with him acted "under color of law" within the meaning of section 1983. (*Dennis,* at pp. 27-30, 101 S.Ct. 183.) In this case, there is no issue of bad faith on the part of the city, and certainly no suggestion of corruption on the part of the court which issued the injunction. Moreover, because it does not explicitly address the question of whether the procurement of an injunction which in itself violates the enjoined party's constitutional rights is actionable under section 1983, *Dennis* is not citable as authority on the issue. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 88, 87 Cal.Rptr.2d 754 [case is not authority for points not decided].)

2727, 73 L.Ed.2d 396.) After reviewing the language of section 1983 and its legislative history, the Supreme Court held that even if employees or officials may be entitled to qualified immunity, municipalities themselves have *no* immunity from damages liability "flowing from their constitutional violations." (*Owen,* at p. 657, 100 S.Ct. 1398.)

The court explained that section 1983 "creates a species of tort liability that on its face admits of no immunities. [Citation.] Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." (*Owen, supra,* 445 U.S. at p. 635, 100 S.Ct. 1398.) Despite the expansive language of section 1983 and the absence of any express incorporation of any common-law immunities, the court noted that it had on several occasions "found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' [Citation.]" (*Owen,* at p. 637, 100 S.Ct. 1398.) Thus, the court has interpreted section 1983 to encompass certain immunities that were well established at common law and which were compatible with the purposes of section 1983. However, there is no tradition of immunity for municipalities. (*Owen,* at pp. 638-650, 100 S.Ct. 1398.) Congress enacted section 1983 to provide a broad remedy of compensation for violation of federally protected civil rights and intended it to be broadly and liberally construed in favor of providing redress (*Owen,* at p. 650, 100 S.Ct. 1398 citing *Monell, supra,* 436 U.S. at p. 685, 98 S.Ct. 2018), and the court found no reason "to suppose that injuries occasioned by a municipality's

unconstitutional conduct were not also meant to be fully redressable through [section 1983's] sweep." (*Owen,* at p. 650, 100 S.Ct. 1398.)

Moreover, to afford such an immunity even for good-faith constitutional violations would be contrary to the purposes of section 1983. Section 1983 was intended not only to provide compensation to the victims of past abuses, "but to serve as a deterrent against future constitutional deprivations, as well." (*Owen, supra,* 445 U.S. at p. 651, 100 S.Ct. 1398.) The court held that the knowledge that a city will be liable "for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." (*Id.* at pp. 651-652, 100 S.Ct. 1398.)

In summary, the court held, "municipalities have no immunity from damages liability flowing from their constitutional violations." (*Owen, supra,* 445 U.S. at p. 657, 100 S.Ct. 1398.) With respect to governmental responsibility, "No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct. . . . [I]n the scenario of the [section] 1983 cause of action . . . [t]he innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more

appropriately chargeable to the populace as a whole. And the public [as represented by the municipal entity] will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' [Citation]." (*Id.* at pp. 657-658, 100 S.Ct. 1398.)

Owen, supra, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 makes it abundantly clear that a city has no immunity for constitutional violations, and that it is no defense to a section 1983 action that the city acted based on a good-faith belief that its actions were lawful. Reliance on existing law does not confer immunity. Rather, a city is liable for violations of constitutional rights "even if those rights had not been clearly established when the violation occurred. Such a determination merely makes municipalities, like private individuals, responsible for anticipating developments in the law. We noted that such liability would motivate each of the city's elected officials to 'consider whether his decision comports with constitutional mandates and . . . weigh the risk that a violation might result in an award of damages from the public treasury.' [Citation.]" (*American Trucking Associations, Inc. v. Smith* (1990) 496 U.S. 167, 185, 110 S.Ct. 2323, 110 L.Ed.2d 148.) It is only where changes in the law are not reasonably foreseeable that a city may avoid liability if its conduct comported with the law as it existed at the time of the conduct in question. (*Ibid.*) Similarly, good-faith reliance on a preliminary injunction or other order of a trial court does not confer such a defense. Rather, a city must anticipate that a trial court ruling may be overturned

on appeal and must weigh the risk that proceeding in reliance on the trial court order may result in an award of damages.

For the foregoing reasons, we conclude that a city is liable for damages under section 1983 if it chooses to enforce an unconstitutional ordinance by means of a preliminary injunction. It is no defense that the injunction was sought in good faith, nor does the city's reliance on a preliminary injunction duly issued by a trial court insulate it from liability.

We next address the city's contention that Manta has no remedy for the improperly issued injunction because it failed to obtain an injunction bond.

The city is correct that under both California and federal law, a party which is subjected to an improper preliminary injunction may, as a general rule, recover its damages only by an action to recover on an injunction bond. (*Dickey v. Rosso, supra,* 23 Cal.App.3d at p. 497, 100 Cal.Rptr. 358; *Coyne-Delany, supra,* 717 F.2d at p. 393.) An exception to that rule lies, however, if the party which obtained the injunction did so maliciously and without probable cause. (*Robinson v. Kellum* (1856) 6 Cal. 399, 399-400; *Dickey v. Rosso, supra,* 23 Cal.App.3d at p. 497, 100 Cal.Rptr. 358; *Meyers v. Block* (1887) 120 U.S. 206, 211-212, 7 S.Ct. 525, 30 L.Ed. 642; *Buddy Systems, Inc. v. Exer-Genie, Inc.* (1976) 545 F.2d 1164, 1168.) Under those circumstances, the wrongfully enjoined party can sue for malicious prosecution and can recover damages even if there was no injunction bond. (*Buddy Systems, Inc. v. Exer-Genie, Inc., supra,* 545 F.2d at p. 1168.) Because the act of seeking the

injunction maliciously and without probable cause is itself a tort, the action is not subject to the statutory rules which limit recovery of damages for the mere erroneous issuance of a preliminary injunction. (See *Robinson v. Kellum, supra,* 6 Cal. at p. 400.)

Similarly, a section 1983 claim is a "species of tort." (*Owen, supra,* 445 U.S. at p. 635, 100 S.Ct. 1398.) Thus, just as the act of seeking an injunction maliciously and without probable cause is a tort, so too is the act of seeking and obtaining an injunction to enforce an unconstitutional ordinance. The trial court recognized this, holding that the injunction was the vehicle by which the city sought to enforce an unconstitutional ordinance, and that Manta's cross-complaint was thus based not on the mere wrongful issuance of an injunction but on "a separate and distinct action for violation of [Manta's] constitutional rights" by means of the injunction. By analogy to the rule that damages for a maliciously obtained injunction are available regardless of the existence of an injunction bond, a section 1983 action based on a city's act of obtaining an injunction to enforce an unconstitutional ordinance is also not subject to the rule that damages may be recovered only in an action on a bond.

The city cites *Coyne-Delany, supra,* 717 F.2d 385 as authority that the rule that damages for an improperly obtained injunction are available only if an injunction bond has been obtained applies in section 1983 litigation. However, *Coyne-Delany* does not state such a rule. Moreover, its facts are the converse of the facts in this case. In that case, a manufacturer sued a public entity for alleged deprivation of a constitutionally

protected property right in connection with a state contract to replace plumbing fixtures in an Illinois state prison. The manufacturer obtained a temporary restraining order to prevent the threatened deprivation of its rights. When the subsequent preliminary injunction was dissolved, the court held that the defendant -- the public entity -- could obtain damages only up to the amount of the injunction bond. (*Id.* at pp. 388-390, 393-394.) Thus, in that case, the party which alleged a deprivation of its civil rights was also the party which sought and obtained the preliminary injunction. In this case, the injunction was not issued to enjoin an alleged violation of Manta's civil rights but rather was the *means* of depriving Manta of its civil rights. *Coyne-Delany* is thus inapposite.

In summary, we conclude that the section 1983 action is a tort action independent of the statutory remedies for improperly issued preliminary injunctions, and that the absence of a bond is irrelevant to Manta's claim for damages.[4]

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[4] There is an independent reason that section 995.220 of the Code of Civil Procedure cannot be applied to defeat Manta's claim. Section 995.220 was enacted to provide municipalities with immunity from damages resulting from improperly issued injunctions. (*City of South San Francisco v. Cypress Lawn Cemetery Assn., supra,* 11 Cal.App.4th at p. 922, 14 Cal.Rptr.2d 323.) However, the United States Supreme Court has held that conduct which is wrongful under section 1983 cannot be immunized by state law. (*Martinez v. State of California* (1980) 444 U.S. 277, 284, fn. 8, 100 S.Ct. 553, 62 L.Ed.2d 481.) "'A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a

The city next contends that Manta waived its right to damages because it failed to "invoke the federal supremacy clause" and demand an injunction bond under rule 65 of the Federal Rules of Civil Procedure.

Rule 65 provides in pertinent part that "no preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof." (Fed. Rules Civ.Proc., rule 65(c), 28 U.S.C.) A state public entity, such as a city, is apparently not exempt from this requirement. However, federal procedural rules are generally not applicable in state court proceedings (*Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.* (D.C.Cir. 1971) 442 F.2d 1234, 1239; *Rader v. Baltimore & O.R. Co.* (7th Cir. 1940) 108 F.2d 980, 986), and the city provides no authority or argument which supports its claim that Manta could have invoked rule 65 of the Federal Rules of Civil Procedure to require the city to post a bond. Moreover, because we have determined that Manta's section 1983 claim is not subject to the rules concerning damages resulting from an erroneously issued preliminary injunction, the availability of a bond is irrelevant, and we need not resolve this issue.

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basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. [Citation.] The immunity claim raises a question of federal law.' [Citation.]" (*Ibid.*)

Finally, the city argues that under federal law, there is "good cause" for denying damages based on Manta's failure to oppose the injunction on the grounds on which it ultimately prevailed at trial, i.e., that the ordinance violated Manta's civil rights. It cites *Coyne-Delaney, supra,* 717 F.2d 385 and *Page Communications Engineers, Inc. v. Froehlke* (D.C.Cir. 1973) 475 F.2d 994. Both cases hold that in an action to recover on an injunction bond, the trial court has the discretion to deny or limit recovery based on equitable considerations. (*Coyne-Delaney, supra,* at pp. 381-383; *Page Communications Engineers, Inc. v. Froehlke, supra,* at p. 997.)

In our tentative opinion, we pointed out that the city did not provide any citation to the record to demonstrate that the issue was raised below, and we therefore declined to address it. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486, 61 Cal.Rptr.2d 341.) Prior to oral argument, the city submitted a document which included citations to the record demonstrating that it did raise the issue during the bench trial on liability under section 1983. The trial court did not rule directly on that contention, but rejected, as we have done, the city's argument that the section 1983 action was subject to the rules applicable to claims for damages resulting from the erroneous issuance of an injunction. We can infer, therefore, that the court concluded that the rule the city now asserts does not apply to Manta's claim under section 1983. We agree, for the reasons stated above, i.e., that because Manta's section 1983 claim is a tort action, it is not subject to the rules which apply to actions for erroneously issued injunctions.

ISSUES PERTAINING TO BURDEN OF PROOF AND SUFFICIENCY OF THE EVIDENCE

Introduction

The city makes three arguments which are related: that Manta was not entitled to recover any damages based on profits it would have made from illegal activities; that the court incorrectly allocated to it the burden of proving how much of Manta's profits were derived from illegal activities; and that the evidence was insufficient to allow the jury to determine the amount of profit from legal activities Manta lost. The following background pertains to those issues.

Approximately 53 months elapsed between the time Manta was forced by the preliminary injunction to cease operating as an adult cabaret and the time it reopened. By the time the damages trial commenced, Manta had been back in operation as an adult cabaret for approximately the same length of time. For this reason, the trial court decided that the profit Manta had made since reopening was the most appropriate basis for determining the profit Manta would have made during the period the club was not operating. Accordingly, Manta's case in chief consisted of evidence of the expenses it incurred in maintaining its premises while it was unable to operate as an adult cabaret and the profit it had earned since it reopened. Its expenses during the shutdown, for items such as rent, maintenance of the building and landscape maintenance, totaled $943,208. Its net profits after reopening totaled $1,669,064. Manta thus requested damages in the amount of $2,612,272.

The city challenged the accounting basis for Manta's claimed damages[5], and also presented evidence that a number of the dancers at the club engaged in prostitution, with the knowledge and encouragement of Manta's owner, Waldon Randall Welty, and the club's management. Manta rebutted the city's evidence concerning prostitution by testimony from several dancers that while some of the women engaged in prostitution, the majority of them engaged only in legal lap dances, and that Manta's management did not countenance prostitution. Manta's evidence included testimony from one of its managers that she reprimanded, suspended and occasionally terminated dancers who went beyond the bounds of legality.

A special verdict required the jury to answer four questions pertaining to damages. The jury answered "yes" to the question, "Do you find that any net profits earned between July 9, 1999 and March 31, 2004 were earned from illegal activities?" and the question, "Are you able to reasonably allocate Manta Management, Inc.'s net profit as between lawfully earned net profit and unlawfully earned net profit?" The jury awarded Manta $1.4 million in damages, but was not required to specify how it arrived at that figure.

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[5] Although the city challenged Manta's expert as to the propriety of adding Manta's out of pocket expenses during the shutdown to the profits it earned during the period after it reopened to determine its total damages, the city's accounting expert agreed that this was appropriate.

Discussion

1. *Manta Was Entitled to Recover Profits It Would Have Earned from Its Legal Activities*

The city contends that because some of Manta's income was earned from prostitution, it should be barred from recovering any of its lost profits. The city relies on cases which illustrate the principle that no person or entity is entitled to sue to recover damages incurred in connection with illegal activity. (See, e.g., *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109-1113, 260 Cal.Rptr. 6 and cases discussed therein.) It also relies by analogy on cases which hold that illegal contracts cannot be enforced.

We agree that Manta is not entitled to recover any portion of its profits that were generated by illegal activity. However, just as contracts which have both legal and illegal objectives may be enforced if the illegal objectives can be severed from those which are legal (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 122-123, 99 Cal Rptr.2d 745, 6 P.3d 669), a business which engages in some illegal conduct should be allowed to recover its legally-earned profits.

With respect to contracts that are partially illegal in their terms or objectives, the California Supreme Court has held that "'. . . [w]hether a contract is entire or separable depends upon its language and subject matter . . . . If the contract is divisible, the first part may stand, although the latter is illegal. [Citation.]' [Citations.] . . . Thus, the rule relating to severability of partially illegal contracts is that a contract is

severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side." (*Keene v. Harling* (1964) 61 Cal.2d 318, 320-321, 38 Cal.Rptr. 513, 392 P.2d 273; see *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 122, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

These principles apply to contracts which involve subject matter which is subject to criminal prosecution. Thus, in *Keene v. Harling, supra,* the court held that a contract for the sale of coin-operated machines was severable and thus partially enforceable, even though some of the machines were illegal gambling machines. Because the contract specified the consideration to be paid for each machine, the legal portion of the contract could be severed from the illegal portion, and the seller was entitled to the agreed-upon consideration for the legal machines. (*Keene v. Harling, supra,* 61 Cal.2d at pp. 319-321, 38 Cal.Rptr. 513, 392 P.2d 273.) It is only where the agreement is "permeated by an unlawful purpose" to the extent that the illegality cannot be purged from the contract without reforming it that it must be declared void. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at pp. 124-125, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Although the analogy between illegal contracts and the situation before us is not exact, the underlying principle applies to both situations. If a business earns profits from some activities which are legal and some which are illegal, it should be entitled to recover legal profits it would have made but for the wrongful

conduct of another, unless the legal profits cannot be separated from the illegal profits or the illegality so permeates the business that a trier of fact could conclude that it is essentially a criminal enterprise.

Here, the jury found that it was possible to separate Manta's legal revenue from the revenue it derived from illegal activities. We address the sufficiency of the evidence supporting that determination below.

2. *The Instructions on Burden of Proof*

The city complains that the jury instructions erroneously placed on it the burden to prove the portion of Manta's lost profits which resulted from illegal activity. It contends that once it proved that some of Manta's profits resulted from prostitution, the burden should have shifted to Manta to prove what portion of its profits resulted from legal activities. Instead, it complains, the instructions told the jury that "it was the City's burden to prove each dollar of income which came from prostitution, and told the jury that Manta was entitled to every dollar the City could not expressly prove came from prostitution."

This is patently untrue. Not only do the instructions not place the burden on the city to prove that "every dollar that came from prostitution," the instructions implicitly, if not explicitly, placed the burden of proof on Manta.

After explaining that lost profits can be recovered only when the evidence shows with reasonable certainty both that profits would have been earned and

the amount of those profits, the court instructed that the party which seeks damages based on lost profits "has the burden of presenting the best evidence available under the circumstances to attempt to establish a claim for lost profits." It went on to instruct that if the jury found that the profits Manta contended it would have earned during the shutdown "were generated in whole or in part from illegal activities, you may consider that fact in evaluating what percentage, if any, of such profits should be excluded from [Manta's] lost-profits-damages claim." Finally, it reiterated that a party "cannot recover damages . . . if the profits would have been earned from illegal activities." Nowhere in the instructions did the court state that the city had any burden whatsoever. We conclude that the jury would have understood the instructions quoted above to require Manta to prove, with reasonable certainty, the amount of *legal* profits it lost as a result of the injunction. Thus, assuming that the burden of proof should have been on Manta, as the city contends, the instructions correctly allocated the burden.

We do agree with the city that the court erred in instructing the jury that if it found that any of Manta's profits resulted from illegal activities, it "may" consider that fact in evaluating the percentage of profits which should be excluded from the damage award. Because Manta was not entitled to recover any lost profits which were derived from illegal activities (*Homami v. Iranzadi, supra,* 211 Cal.App.3d at pp. 1109-1113, 260 Cal.Rptr. 6), the language should have been mandatory rather than permissive. However, in light of the fact that the jury awarded Manta $1.4 million rather than the $2.6 million Manta sought, it

is obvious that the jury did factor in the percentage of profits it determined to have been derived from prostitution. Thus, there is no reasonable probability that the city would have fared better if the jury had been instructed that it was required to deduct illegal profits from any award of damages, and the error was not prejudicial. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674, 3 Cal.Rptr.3d 279 [failure to give burden-shifting instruction not prejudicial pursuant to Cal. Const., art. VI, § 13].)

3. *Substantial Evidence Supports the Award of Damages*

The city contends that if Manta was entitled to damages based on income it derived from legal activities, the evidence was insufficient to permit the jury to determine what portion of Manta's income was derived from legal activities.

On a claim of insufficient evidence, we review the entire record to determine whether there was substantial evidence in support of the judgment. We review the evidence in the light most favorable to the respondent and resolve all evidentiary conflicts and indulge all reasonable inferences in support of the judgment. If there is substantial evidence, contradicted or uncontradicted, which will support the judgment, we must uphold it. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, 68 Cal.Rptr.2d 758, 946 P.2d 427; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925.)

We do not know, of course, how the jury arrived at the amount it awarded. However, there were two

components to Manta's damages: the expenses it incurred during the shutdown and the profits it would have made during that period. The city does not dispute that there was substantial evidence as to the expenses, nor does it claim that the expenses were tainted by illegality. An award of the full amount of the expenses would therefore be supported by substantial evidence. Assuming that the jury did award Manta the full amount of its expenses, the balance of the damages it awarded based on lost profits is $456,792 ($1,400,000 - $943,208). This is slightly more than 25 percent of the amount of Manta's claim for lost profits. If there is substantial evidence which supports the conclusion that approximately 25 percent of Manta's income was derived from legal activities, we must affirm the judgment.

There was substantial evidence that some of Manta's income was derived from legal activities. In addition to fees charged for lap dances, the club also obtained income from admission fees and sales of soft drinks at greatly inflated prices. Lap dancing which did not involve any acts amounting to prostitution was legal during the period that Manta was shut down. (See discussion in next section.) The club also had a stage show, which was legal. Although there is evidence that a great deal of sexual activity took place under the guise of lap dances, the evidence also showed that some customers did not purchase lap dances, but merely watched the stage show. Others who paid for lap dances did not actually have the dancer perform, but merely engaged in conversation with the dancer. Furthermore, not all of the lap dancers engaged in prostitution. The evidence concerning the extent to which prostitution occurred

during lap dances was conflicting. Some of the dancers or former dancers who testified said it was rampant and blatant while others said they saw sexual activity or evidence of sexual activity, such as empty condom wrappers on the floor, only occasionally.

We agree that the evidence does not permit a precise apportionment between the legal and illegal sources of Manta's income. However, such precision is not necessary: A business is not required to prove lost profits with precision, but only with "reasonable certainty." (*S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 537-538, 30 Cal.Rptr.2d 286.) Resolution of conflicts in the evidence and determinations as to the credibility of witnesses are the exclusive province of the jury. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766, 60 Cal.Rptr.2d 770.) The evidence permitted a range of inferences as to the extent of the prostitution which took place at The Flesh Club. It certainly supports the inference that Manta derived about 75 percent of its profits from illegal activities and about 25 percent from legal activities.

THE TRIAL COURT PROPERLY EXCLUDED REFERENCE TO SAN BERNARDINO MUNICIPAL CODE SECTION 5.14

The city contends that the court erred by refusing to admit evidence and to instruct the jury that Manta violated San Bernardino Municipal Code section 5.14, which prohibits lap dancers from touching customers. It contends that because the evidence showed that many, perhaps most, of the dancers did touch their

customers while performing lap dances, the majority of Manta's income was illegal.

The city does not make clear the legal basis for its argument that the trial court erred, nor does it state the applicable standard of review. However, since -- as we discuss below -- the trial court determined that the evidence pertaining to section 5.14 was not relevant, we review the court's ruling for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 8, 82 Cal.Rptr.2d 413, 971 P.2d 618.)

The city argued below that it should be allowed to adduce evidence that San Bernardino Municipal Code section 5.14 prohibits lap dancers from touching customers. The trial court ruled that the ordinance or any violation of its provisions was irrelevant because, as the city conceded, the ordinance was enacted only after Manta resumed operations in July 1999. Thus, any lap dances which involved touching the customers, but falling short of prostitution, would have been legal during the period Manta was shut down. Even if Manta's post-July 1999 earnings for such dances were illegal, this did not preclude Manta from using its post-July 1999 earnings and expenses as the basis for establishing the profit it would have made during the shutdown because Manta was not seeking to recover profits based on activities which were illegal when they were performed. Rather, it was merely using its post-July 1999 activities as a model to establish as nearly as possible the profits it would have earned for the same activities during the earlier period, when they undisputedly were legal. The court also declined the city's request to instruct on the ordinance.

Evidence Code section 350 precludes the admission of any evidence except relevant evidence. Relevant evidence is that which has a tendency in reason to prove a disputed fact which is of consequence to the determination of the action. (Evid. Code, § 210.) The trial court has broad discretion to determine what evidence is relevant. (*People v. Cash* (2002) 28 Cal.4th 703, 726, 122 Cal.Rptr.2d 545, 50 P.3d 332.) Here, there was no abuse of discretion.

The city cites no authority which establishes the relevance of evidence that Manta's post-July 1999 activities violated the ordinance. It relies by analogy on cases which hold that a person may not seek to recover damages for breach of contract where the contract itself was illegal, or where actions performed pursuant to the contract were illegal. It also argues that the fact that the sale of opium and cocaine was legal at one time would not permit a seller of those drugs to bring an action for breach of contract for goods sold after they became illegal.

These analogies are inapt, primarily because Manta is not seeking compensation for acts which were illegal when they were performed. Rather, it is seeking damages for profits it would have earned from activities it would have engaged in at a time when those activities were legal, had the city not prevented it from doing so.

We find no abuse of discretion in the trial court's decision to allow Manta to use its post-July 1999 income and expenses as the basis for proving the profit it would have earned if it had been allowed to operate during the 53-month shutdown, nor any abuse of

discretion in determining that it was not relevant that some of activities it engaged in post-July 1999 were illegal solely by virtue of an ordinance which was enacted in July 1999. Those activities were legal prior to July 1999, and any profits Manta might have earned based on those activities would also have been legal.

DISPOSITION

The judgment is affirmed. Manta is to recover its costs on appeal.

We concur: RICHLI and KING, JJ.

APPENDIX E

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

Case No.: SCVSS 18157

[Filed September 23, 2004]

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

MANTA MANAGEMENT CORPORATION,
A CALIFORNIA CORPORATION, et al.
Defendants.

MANTA MANAGEMENT CORPORATION,
Cross-complainant,

v.

CITY OF SAN BERNARDINO,
Cross-defendant.

This action as filed by the City Attorney of the City of San Bernardino on behalf of the Plaintiff, The People of the State of California on January 20, 1995.

On January 23, 1995 the court issued an order to show cause and temporary restraining order which prevented Manta Management Corporation from presenting live entertainment at 100 West Hospitality Lane which shows any specified anatomical areas, pending hearing on a motion for preliminary injunction. On February 9, 1995 the court issued a preliminary injunction which prevented Manta Management Corporation from regularly featuring live entertainment at 100 West Hospitality Lane which are characterized by exposure of specified anatomical areas, pending a trial on the merits.

On January 19, 1996 Manta Management Corporation filed a cross-complaint which sought both a declaration that ordinances of the City of San Bernardino are invalid and damages.

Trial of the civil nuisance abatement action began on July 22, 1996. On November 15, 1996 the Court determined the zoning provision in question to be invalid and ordered the preliminary injunction dissolved.

The City/People filed a notice of appeal of the order dissolving the preliminary injunction. The City/People also filed applications for a temporary stay and writ of supersedeas pending the decision on appeal. On December 19, 1996 the court of appeal issued a temporary stay, and on February 4, 1997 the court of appeal issued a writ of supersedeas. Both orders enjoined the operation of an adult business at 100 West Hospitality Lane pending resolution of the appeal on the merits.

On January 26, 1999 the court of appeal filed an opinion which affirmed the decision of the trial court. The California Supreme Court denied a petition for review on April 21, 1999.

On February 18, 2003 the court granted summary adjudication of the second, third, fourth and fifth causes of action of the cross-complaint.

Trial of the remaining issues presented by the cross-complaint began on April 19, 2004. By stipulation of the parties, the liability issues were tried to the court. The Court ordered Manta Management Corporation to file a first amended cross-complaint which clearly stated its remaining theory of liability. On April 26, 2004 Manta Management Corporation filed a first amended cross-complaint which stated a single cause of action based on 42 U.S.C. § 1983.

On April 28, 2004 the court found the portion of the cross-complaint which seeks declaratory injunctive relief to be moot. The court found the City of San Bernardino liable for the amount of damages, if any, caused by the temporary restraining order, preliminary injunction, temporary stay and writ of supersedeas.

The damages phase of the trial was tried to the jury starting on May 5, 2004. The jury returned the following answers to the questions presented to it:

1. Do you find that Manta Management, Inc. would have earned a net profit between the period of January 23, 1995 and July 18, 1999, but for the temporary restraining order, preliminary injunction

temporary stay and writ of supersedeas? Answer: Yes.

2. Do you find that any net profits earned between July 9, 1999 and November 30, 2003 were earned from illegal activities? Answer: Yes.

3. Are you able to reasonably fix Manta Management Inc.'s lawful net profits as defined in instruction number 3903N after excluding profits found to be derived from illegal activity? Answer: Yes.

4. What amount of damages do you find were caused by the temporary restraining order, preliminary injunction, temporary stay and writ of supersedeas between January 23, 1995 and July 18, 1999? Answer: $1,400,000.

Judgment is therefore entered on the cross-complaint as follows:

1. Manta Management Inc. is entitled to recover $1,400,000 from the City of San Bernardino.

2. Any post-judgment requests by either party which pertain to, and include but are not limited to pre-judgment interest, attorneys' fees and costs will be considered by the court as provided by law.

Dated this 23 day of SEPTEMBER, 2004.

/s/
Donald Alvarez
Judge of the Superior Court

No 08-325

In the Supreme Court of the United States

MANTA MANAGEMENT CORPORATION,

Petitioner,

v.

CITY OF SAN BERNARDINO,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of the State of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

SUMMARY OF ARGUMENT

Petitioner Manta Management Corporation ("Manta") opened an "adult" business in the City of San Bernardino ("City") in direct violation of City zoning ordinances. The City applied for and obtained a preliminary injunction enforcing the zoning restrictions contained in the ordinances. Later, a different judge of the trial court found the zoning restrictions were invalid for reasons having to do with the adequacy of findings in the ordinances and the acreage available to adult businesses. The City appealed and obtained a writ of supersedeas from the California Court of Appeal, but that court later affirmed the trial court judgment solely on the ground that the ordinances lacked adequate findings.

Manta then sued for damages under 42 U.S.C. § 1983 ("section 1983") and state law for the time it was subject to the preliminary injunction and the supersedeas stay. All state law claims were dismissed. The trial court ruled that the act of requesting a preliminary injunction, and the act of requesting a writ of supersedeas, were violations of the federal Constitution which gave rise to damages under section 1983. The jury awarded $1.4 million dollars in damages.

The California Supreme Court reversed the judgment, ruling that the decisions of the trial court and court of appeal to grant the preliminary injunction and writ of supersedeas were

superseding intervening acts that insulated the City from liability under section 1983 unless the City materially misled the courts when they issued the injunction and writ. The court remanded for a trial on whether the courts were materially misled. Manta now petitions for certiorari to review the California Supreme Court decision.

The petition should be denied. In summary:

1. Review by this Court, even if warranted, would be premature until the trial court makes the factual determinations directed by the California Supreme Court in its remand. Depending on the outcome of those determinations, the principal issue on which Manta seeks review may become moot. Alternatively, additional issues may arise that cannot be resolved until the factual determinations on remand have been made.

2. Contrary to Manta's assertion, the California Supreme Court's application of superseding causation in this case is not inconsistent with this Court's decision in Malley v. Briggs, 475 U.S. 335 (1986). Manta's claim that Malley supports the proposition that superseding causation does not apply in section 1983 cases is based wholly on dictum in a footnote. Moreover, even that dictum has not been extended beyond the facts of Malley, which unlike this case involved a non-adversarial judicial determination. Numerous post-Malley Circuit court decisions have applied superseding causation in section 1983 cases, and no decision has interpreted Malley to preclude the application of superseding causation in such

cases, as Manta advocates.

3. Again contrary to Manta's assertion, there is no conflict between the decision of the California Supreme Court and the Tennessee decision cited in the petition. In fact, the Tennessee decision never addressed the proposition for which Manta cites it, i.e., that a municipality is strictly liable under section 1983 if it obtains an injunction to enforce an unconstitutional ordinance, without regard to whether it misled the court that issued the injunction.

4. There also is no conflict between the decision of the California Supreme Court and the decision of this Court in City of Littleton v. Z. J. Gifts 4-U, L.L.C., 541 U.S. 774 (2004). City of Littleton suggested a federal remedy against state judicial procedures if they prove too slow, not against the litigants in the state court proceedings.

5. Federal law holds that the exclusive remedy for an improper injunction is to recover on the injunction bond if there is one. Manta contends that merely asking the court to require a bond gives rise to unlimited damages if the court fails to require a bond and the injunction is later held improper. Settled law rejects that contention. Moreover, Manta never submitted any evidence that could have supported an injunction bond condition, and it failed to raise this issue on appeal.

II

STATEMENT OF FACTS AND OF THE CASE

A. CIVIL NUISANCE ABATEMENT PROCEEDINGS

The City of San Bernardino, like most cities, has zoning ordinances that restrict where "adult" businesses may operate. Manta opened the "Flesh Club" on Hospitality Lane in the City of San Bernardino in a zone that does not allow any "adult" businesses. Manta originally opened a comedy club in 1994 and obtained the necessary permits. As Manta later admitted, this was a subterfuge, because Manta intended from the outset to convert to a nude "adult cabaret" shortly after opening, in direct violation of the City's ordinances.

The City filed a civil nuisance abatement action to enforce its zoning ordinances. Two different judges of the trial court issued a temporary restraining order and then a preliminary injunction prohibiting violation of the ordinances. The TRO and preliminary injunction did not prevent operation; they simply required Manta's employees to keep their clothing on pending a trial.

Approximately a year later, a third judge heard a trial and concluded that the City's ordinances were invalid, for two separate reasons:

1. Although a city can regulate "adult" businesses based on the "secondary effects" those

businesses cause, and can rely on studies conducted by other cities to prove secondary effects, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1981), there were insufficient findings in the ordinances that the secondary effects in San Bernardino would be similar to those in other cities. (In fact, the City had presented evidence at the preliminary injunction stage to support such findings, but did not present the evidence again at trial.)

2. The trial court ruled that when the restrictions on zones and on minimum distances from uses such as houses and schools were considered, the City's zoning ordinances did not allow sufficient sites for adult businesses to operate. Although there was no evidence of *any* competition for any of the available sites, the trial court ruled that 27 sites for adult businesses spread over 80 acres were insufficient.

The City appealed and applied for a writ of supersedeas, which the Court of Appeal issued. Again, the writ of supersedeas did not prevent Manta from operating, but only required it to keep its "dancers" clothed pending the resolution of the appeal. The Court of Appeal took two years to decide the case, and ultimately affirmed on the first ground only: lack of adequate factual findings in the ordinances and failure of the City to present again at trial the evidence of secondary effects it had presented at the preliminary injunction stage.

B. LIABILITY AND DAMAGES PROCEEDINGS

Federal Court Proceedings and Cross-complaint

Manta originally filed an action in federal court seeking an injunction against the City's ordinances. When the federal action was dismissed on abstention grounds, Manta filed a cross-complaint in the City's nuisance abatement action, seeking an injunction against the City's ordinances and damages based on both federal and state law.

All State Law Causes of Action Were Dismissed

The trial court granted summary judgment on all California law causes of action. The case was tried solely on a single federal law cause of action.

The Ordinances Caused No Damages

At the time it granted summary adjudication of the state law causes of action, the trial court found it undisputed that the City's ordinances themselves caused Manta no damages, and the only potential claims for damages were based on the preliminary injunction and the writ of supersedeas pending appeal.

Manta's Theory of Liability

At the start of trial the court directed Manta to file a first amended cross-complaint which succinctly stated its claims. Manta's single claim was based solely on federal law. The only federal Constitutional rights Manta cited were the First and Fourteenth Amendments. The only relevance of the Fourteenth Amendment was to make the First Amendment applicable to the states; Manta did not allege any independent violation of the

Fourteenth Amendment. Damages were claimed only for the period of time Manta was restricted by the court orders from operating as an "adult cabaret" and the time it took to get back in operation after the court proceedings were concluded. Manta's case therefore rested on the premise that the act of requesting a preliminary injunction, and the act of requesting a writ of supersedeas pending appeal, violated the First Amendment.

Liability proceedings

The parties agreed to try the liability issues to the court. The trial court ruled that the act of requesting the preliminary injunction, and the act of requesting the stay pending appeal, violated the federal Constitution and were grounds for damages.

Damages proceedings

The jury was told that liability was established, and was only asked to determine damages. It found that approximately 75% of Manta's profits were derived from prostitution, but awarded $1,400,000 in damages.

C. CALIFORNIA SUPREME COURT OPINION

After unsuccessfully appealing the trial court judgment to the California Court of Appeal, the City sought, and obtained, discretionary review in the California Supreme Court. That court stated the issue for decision as follows:

[T]he ordinance caused Manta no harm

because Manta did not abide by it. Manta suffered no monetary damages until the trial court enjoined its operating an adult cabaret where its comedy club had been located. The issue before us is whether the city's *act of seeking an injunction* to enforce the ordinance dealing with the location of adult businesses and its subsequent *act of filing a petition for writ of supersedeas* to obtain a stay pending appeal "caused" the harm suffered by Manta to the extent that the city is liable for damages Manta incurred during the 53 months the injunction and the stay were in place. Manta Management, Inc. v. City of San Bernardino, 43 Cal.4th 400, 407 (2008), emphasis in original.

In a unanimous opinion, the court concluded:

We conclude, consistent with analogous federal and state court decisions, that the courts' intervening exercise of independent judgment in issuing the preliminary injunction and stay, though the former was dissolved and the latter was lifted after the ordinance was declared unconstitutional, breaks the chain of causation for purposes of section 1983 liability in the absence of evidence that the city materially misled or pressured the judges who were expected to exercise independent judgment. In this case, where the parties dispute whether material misrepresentations were made to the judges who issued the preliminary injunction and the stay, we reverse the judgment of the Court of

Appeal and remand the case for further proceedings on that factual issue. 43 Cal.4th at 403.

III

REVIEW BY THIS COURT IS PREMATURE UNTIL THE TRIAL COURT MAKES THE FACTUAL DETERMINATIONS DIRECTED BY THE CALIFORNIA SUPREME COURT

Rule 10 of the rules of this Court states in part: "A petition for a writ of certiorari will be granted only for compelling reasons." No such compelling reason exists in this case, because consideration by this Court of the principal issue on which Manta seeks review is premature at this juncture.

Manta asks this Court to decide whether the California Supreme Court correctly held that the principle of superseding causation could absolve the City from liability under section 1983 for enforcing an ordinance that was later held to be unconstitutional. The California Supreme Court concluded that since the City enforced the ordinance by obtaining a preliminary injunction and writ of supersedeas, the independent decisions of the courts to issue the injunction and writ insulated the City from liability unless the City materially misled the courts.

The court made it clear, however, that it could not decide at this point whether in fact the principle of superseding causation should apply, because factual disputes existed as to what misstatements the City may have made to the

courts and whether the misstatements were material to the decisions to issue the injunction and writ. Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 413, 181 P.3d 159, 168 (2008). Accordingly, the court remanded the matter "to allow the trial court to resolve any relevant factual issues and to apply the principles of superseding intervening causation in the first instance." Ibid.

The trial court has not yet resolved any factual issues, nor has it determined how, if at all, the principle of superseding causation applies to this case. Depending on how those matters are resolved, the issue on which Manta seeks review could become moot. If the trial court determined that the City made material misstatements that prevented the exercise of the courts' independent discretion, then under the California Supreme Court decision, superseding causation would not apply and the issue on which Manta seeks review – whether superseding causation applies in a section 1983 action – would no longer be presented.

Moreover, the determination of materiality in this context involves subsidiary issues that were not resolved by the California Supreme Court, e.g., the proper standard for proving materiality and whether the issue can be determined by the court as a matter of law or should be submitted to the fact finder. The California Supreme Court plainly contemplated that these and similar subsidiary issues would be considered by the trial court in the first instance. There is no compelling reason this

Court should intervene in that process at this time.

This Court has recognized that while the pendency of further trial court proceedings does not necessarily preclude certiorari jurisdiction, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477, 95 S.Ct. 1029 (1975), "[t]he presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction, for the issuance of the writ is discretionary." Hammerstein v. Superior Court of California, 341 U.S. 491, 492, 71 S.Ct. 820 (1951). For the reasons stated, the Court should decline to exercise its discretion to review this case at this premature stage.

IV

THE CALIFORNIA SUPREME COURT'S APPLICATION OF SUPERSEDING CAUSATION TO THIS CASE IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN MALLEY V. BRIGGS

This Court repeatedly has stated that actions brought under § 1983 are governed by common law tort principles. Heck v. Humphrey, 512 U.S. 477, 483 (1994) (" We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.' [Citation] Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the

inquiry under § 1983 as well.' [Citation]"); Kalina v. Fletcher, 522 U.S. 118, 123 (1997) ("Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment. [Citations]"); United States v. Texas, 507 U.S. 529, 534 (1993) (" statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' [Citation] . . .' In order to abrogate a common-law principle, the statute must speak directly' to the question addressed by the common law."); Inyo County v. Paiute-Shoshone Indians of Bishop County, 538 U.S. 701, 709 (2003) (in enacting § 1983, "Congress did not intend to override well-established immunities or defenses under the common law"); Meyer v. Holley, 537 U.S. 280, 285 (2003) ("when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules").

At the time § 1983 was adopted, superseding, intervening cause was an established part of the common law of torts. See, e.g., Scheffer v. R. R. Co., 105 U.S. 249, 252 (1881); Milwaukee & S.P.R. Co. v. Kellogg, 94 U.S. 469, 474 (1876); Pike v. Grand Trunk R. Co., 39 F. 255, 257 (Circuit Court N.H. 1889); Estill v. New York, L.E. & W. Co., 41 F. 849, 846 (Circuit Court Mo. 1888); The Ontario, 37 F. 220, 223 (E.D. Mich. 1889).

Manta contends this Court rejected the

application of superseding, intervening cause to section 1983 cases in a footnote in Malley v. Briggs, 475 U.S. 335 (1986). However, the actual holding in Malley did not concern superseding causation. In Malley, this Court considered whether absolute or qualified immunity should apply to a police officer who files a warrant application that is not supported by probable cause. The court held that qualified immunity applies, unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." 475 U.S. at 345-356.

Then, in the footnote upon which Manta places such great significance, the Court stated:

> Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of §1983. As we stated in Monroe v. Pape [citation], §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his action." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983 as recognizing the same causal link. 475 U.S. at 345, n. 7.

As is apparent from the Malley Court's observation that the officer had "not pressed" the superseding causation argument, the Court's discussion of whether the principle should apply in section 1983 was dictum. Manta, in fact, acknowledges that the discussion was dictum, Petition at 6, yet it then repeatedly refers to the dictum as the "decision" of the Court, and goes on to assert that the California Supreme Court's application of superseding causation to this case is contrary to that "decision." Petition at 7, 15-18. Even more creatively, in its statement of questions presented, Manta characterizes the dictum in Malley as "the teaching of this Court," and implies that the California Supreme Court committed legal error by not "following" the teaching. Petition at i.

Post-Malley Circuit court cases have recognized the Malley footnote for what it is – non-authoritative dictum that should not be interpreted to preclude the application of superseding causation to section 1983 cases. In Egervary v. Young (3rd Cir. 2004) 366 F.3d 238, 247-248 (3rd Cir. 2004), which the California Supreme Court cited, the Third Circuit pointed out that the dictum in the Malley footnote addressed an issue on which this Court had not granted certiorari, and that under the common law referenced in the footnote, there is potential liability for the acts of an independent decisionmaker such as a court only if the decisionmaker has been misled:

> To the extent that the common law recognized the causal link between a

> complaint and the ensuing arrest, it was in the situation where "misdirection" by omission or commission perpetuated the original wrongful behavior. [Citation] If, however, there had been an independent exercise of judicial review, that judicial action was a superseding cause that by its intervention prevented the original actor from being liable for the harm. [Citations] Thus, the cryptic reference to the common law in Malley's footnote 7 would appear to preclude judicial action as a superseding cause only in the situation in which the information, submitted to the judge, was deceptive.

That is, of course, exactly what the California Supreme Court held in this case – an intervening judicial decision is a superseding cause *unless* the party who procures the decision misrepresents material facts to the issuing court.

Other post Malley decisions have noted that in Malley the judicial determination – issuance of an arrest warrant – occurred in a non-adversary setting, and have concluded that Malley is no bar to the application of superseding causation where, as here, the judicial determinations at issue occur in an adversary setting where procedural safeguards exist to protect against erroneous decisions. In Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986), for example, the Seventh Circuit afforded qualified immunity to a medical examiner in a section 1983 action alleging prosecution without probable cause. The court held that the grand jury's return of an indictment

established that there was probable cause for the prosecution. It further stated that Malley did not undermine its conclusion, because "[t]he procedural protections in grand jury hearings, particularly the involvement of a group of jurors, are much greater than those available when arrest warrants are issued." *Id.* at 892, n. 10; see also Burns v. County of King, 883 F.2d 819, 822-23 (9th Cir. 198?) (Malley did not preclude immunity for social worker who supplied information to court not as a "complaining witness" as in Malley, but "in adversarial post-trial proceedings").

In fact, the California Supreme Court cited no less than eight post-Malley decisions of the United States Courts of Appeals, and two post-Malley state court decisions, in support of its conclusion that a court's adjudication of a matter is a superseding causation that breaks the chain of causation between the conduct of the defendant in seeking judicial relief and any resulting damage to the plaintiff. Manta Management Corp. v. City of San Bernardino, 43 Cal.4th at 409-12, 181 P.3d at 165-67. Yet Manta does not discuss, or even acknowledge, a single one of these decisions.

Although there are some disagreements among the lower courts about how superseding, intervening cause applies under specific fact situations, lower courts all follow some version of it. None of the lower courts adopts Manta's argument that the principle does not apply at all to actions based on federal law. Rather, federal courts routinely apply common law rules of causation, including the rule of superseding cause

stated in Restatement of Torts (Second) § 440-441. Most relevant for purposes of this case, superseding cause has been applied to cases based on:

- Court injunctions and rulings in criminal cases. The cases hold that an independent decision of the court cuts of liability unless the court was misled. Galen v. County of Los Angeles 477 F.3d 652, 663 (9th Cir. 2007) (order setting bail); Townes v. City of New York 176 F.3d 138 (2nd Cir. 1999), cert. den. 528 U.S. 964 (1999) (order denying a motion to suppress); Wray v. City of New York, 490 F.3d 189 (2nd Cir. 2007) (same); Egervery v. Young, 366 F.3d 238, 248 (3rd Cir. 2004), cert. den. 543 U.S. 1049 (2005) (order granting an ex parte application for an order seizing a child in a custody dispute); Murray v. Earle, 405 F.3d 278 (5th Cir. 2005), cert. den. 546 U.S. 1033 (2005) (decision to admit a confession); Mayor of Lansing v. KKK 564 N.W.2d 177, 180-183 (Mich.App. 1997), cert. den. 524 U.S. 904 (1998) (preliminary injunction). Cf. Dominguez v. Hendley ___ F.3d ___, 2008 U.S.App.Lexis 20577, * 6-8 (7th Cir. 2008) (causation was shown because the court was misled).

- The decision of a prosecutor to file criminal charges. Again, the cases hold that the independent decision cuts off liability unless the prosecutor was misled. Newman v. County of Orange, 457 F.3d 991, 993 (9th Cir. 2006), cert. den. 127 S.Ct. 1383 (2007); Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. den. 459 U.S.

829 (1982)[1]; Blankenhorn v. City of Orange, 485 F.3d 463 (9th Cir. 2007); Barts v. Joyner, 865 F.2d 1187, 1195-1196 (11th Cir. 1989) (acts of prosecutor, judge and jury); Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007).

These cases hold that an independent decision of judge or a prosecutor cuts off the chain of causation unless the judge or prosecutor was materially misled at the time of the decision. The California Supreme Court properly followed these cases. The decision of the California Supreme Court is fully consistent with Malley and the cases which follow it. Hence, Manta's claim that the California Supreme Court's application of the superseding causation doctrine in this case was "inconsistent" with Malley is illusory.

V

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CALIFORNIA SUPREME COURT AND THE TENNESSEE SUPREME COURT DECISION ON WHICH MANTA RELIES

Manta attempts to manufacture a conflict between the decision of the California Supreme Court in this case and the decision of the Tennessee Supreme Court in City of Knoxville v. Entertainment Resources, 166 S.W.3d 650 (Tenn. 2005), cert. den. 545 U.S. 1061 (2005). That case,

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[1] This Court cited Smiddy with approval in Hartman v. Moore, 547 U.S. 250, 263 (2006).

which was not cited prior to the present petition, never even mentioned the principle of superseding causation. In City of Knoxville, the trial court granted a preliminary injunction enforcing an ordinance against an "adult" business. The Tennessee Supreme Court found the ordinance invalid as unduly vague and remanded as to damages. The Court never once mentioned liability or causation.

The unpublished court of appeals opinion referenced in the Tennessee Supreme Court opinion only addressed two narrow issues because that was all the city raised: "The City asserts that Entertainment Resources damage claims are too speculative in nature to support a judgment and that the company failed to mitigate its damages after entry of the temporary injunction.'" City of Knoxville v. Entertainment Resources, 2003 Tenn.App.Lexis 821, * 22 (Tenn. App. 2003). Again, the court addressed no issues concerning liability or causation.

It must be assumed that if the issue of superseding causation had been raised in either of the Tennessee cases, the court would have addressed it. Accordingly, the only reasonable inference is that the issue was not raised in either court. That being the case, Manta's assertion of a conflict between the Tennessee decisions and the decision of the California Supreme Court is wholly unsupported and cannot provide a basis for review by this Court.

VI

MANTA COMPLETELY MISREADS THIS COURT'S DECISION IN CITY OF LITTLETON

Manta contends this Court's decision in City of Littleton v. Z. J. Gifts 4-U, L.L.C., 541 U.S. 774 (2004), addressed damages. Manta completely misreads the Court's opinion. The issue actually addressed in City of Littleton was whether a city had to write procedures for judicial review of "adult" business regulations into its ordinances, or whether reliance on state court procedures is sufficient. This Court held that state court procedures are sufficient, especially since state courts will be sensitive to the First Amendment issues. The sentence Manta quotes actually states that federal courts can correct delays in state court procedures; there is no suggestion that a litigant should be subject to damages if the state court delays.

> In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. We reach this conclusion for several reasons.
>
> First, ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm.

Indeed, where necessary, courts may arrange their schedules to "accelerate" proceedings. Colo. Rule Civ. Proc. 106(a)(4)(VIII) (2003). And higher courts may quickly review adverse lower court decisions. [Citation]

Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. We presume that courts are aware of the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." [Citations] There is no evidence before us of any special Colorado court-related problem in this respect. And were there some such problems, federal remedies would provide an additional safety valve. See Rev Stat § 1979, 42 U.S.C. § 1983. 541 U.S. at 781-782.

VII

THERE WAS NO WRONGFUL ACT WHICH COULD SUPPORT DAMAGES

Although the California Supreme Court decided the case on causation grounds, a prior question is whether there was a violation of the federal Constitution at all. Manta raises that issue as a question presented, but then completely ignores that question in the body of the petition.

A. REQUESTING A COURT TO ISSUE AN ORDER IS NOT A WRONGFUL ACT

It obviously does not violate the federal Constitution to file litigation which results in a judgment in the plaintiff's favor. Rather, except to the very limited extent that federal law recognizes a malicious prosecution claim or a claim based on the violation of a specific federal constitutional right, even filing and pursuing an *unsuccessful* lawsuit is not a wrongful act under federal law at all. See Hartman v. Moore, 547 U.S. 250 (2006) (part of a plaintiff's prima facie case is proof of lack of probable cause); Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003), cert. den. 543 U.S. 808 (2004) (summarizing federal cases concerning malicious prosecution).

Manta's position therefore boils down to a contention that the First Amendment provides it with a right not to be sued unsuccessfully, or alternatively, a right not to have a court grant a preliminary injunction unless the preliminary injunction is sustained at trial. No published case supports that contention, and several analogous cases reject it. Laxalt v. McClatchy, 622 F.Supp. 737 (D. Arizona 1985) (the First Amendment provides a defense to the libel suit, but does not provide a right not to be sued for libel or a right to damages based on being sued for libel); Jungherr v. San Francisco U.S.D. Board of Education, 923 F.2d 743 (9th Cir. 1991), cert. den. 502 U.S. 808 (1991) (the First Amendment provides a defense to a defamation action, but provides no right not to be sued for defamation); Gritchen v. Collier, 254 F.3d

807, 811 (9th Cir. 2001) ("there is no constitutional right to be free from defending speech in court").

Similarly, the First Amendment provided Manta with a defense to the civil nuisance abatement action. However, it provided no right not to be sued and no right not to have a motion requesting a preliminary injunction or stay pending appeal filed or granted.

Stated otherwise, it is not a wrongful act, and not a violation of the First Amendment, for a public entity to request a trial court to issue a preliminary injunction or to request an appellate court to issue a stay.

B. THE FIRST AMENDMENT PRECLUDES LIABILITY FOR LITIGATION SUPPORTED BY PROBABLE CAUSE

One right protected by the First Amendment is the right to file and prosecute lawsuits in court to resolve disputes. Although this right is usually invoked against the government, cities and other local government entities also have a First Amendment right to resolve disputes in court. Herr v. Pequea Township, 274 F.3d 109, 119 (3rd Cir. 2001)[2]; Mariana v. Fisher, 338 F.3d 189, 199 (3rd Cir. 2003), cert. den. 540 U.S. 1179 (2004); Sanghvi v.

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[2] An unrelated aspect of the case – the proper standard for asserting a substantive due process claim – was overruled in UA Theater Circuit v. Township of Warrington, 316 F.3d 392, 400 (3rd Cir. 2003).

City of Claremont, 328 F.3d 532, 543 (9th Cir. 2003), cert. den. 540 U.S. 1075 (2003); County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1387, 1390 (E.D. N. Y. 1989)[3]; Schneck v. Saucon Valley School District, 340 F.Supp.2d 558, 573 (E.D. Penn. 2004).

There can be no liability based on the exercise of the First Amendment right to resolve disputes in court unless the litigant acts without probable cause or in bad faith. Professional Real Estate Investors v. Columbia Picture Industries, 508 U.S. 49, 56 (1993); Herr, 274 F.3d at 115-116, and cases cited therein ("While the right to petition conferred by the First and Fourteenth Amendments does not provide an absolute immunity from liability for actions based on petitioning activity [citation], the Supreme Court has held that such liability cannot be imposed in the absence of a finding that the position taken lacked any reasonable basis"); Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265, 1273 (6th Cir. 1989); IGEN International, Inc. v. Roche Diagnostics GMHM, 335 F.3d 303, 310 (4th Cir. 2004); Porous Metals Corp. v. Pall Corp., 186 F.3d 1077, 1080, n. 4 (8th Cir. 1999); Hufsmith v. Weaver, 817 F.2d 455, 458-460 (8th Cir. 1987).

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[3] Affirmed in part and reversed in part in an opinion which did not address this issue. County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2nd Cir. 1990).

C. THE CALIFORNIA SUPREME COURT REMANDED FOR A HEARING ON WHETHER THE COURTS WERE MISLED AT THE TIME THEY ISSUED THEIR ORDERS

There is an exception to these rules if malicious prosecution or bad faith can be shown. Manta never alleged either one. Nevertheless, the California Supreme remanded for a trial on whether the trial court or court of appeal were misled at the time the preliminary injunction and stay pending appeal were issued, so Manta has a full right to litigate these issues.

VIII

UNDER FEDERAL LAW, THERE IS NO LIABILITY FOR DAMAGES BASED ON A PRELIMINARY INJUNCTION OR STAY PENDING APPEAL UNLESS MALICIOUS PROSECUTION OR BAD FAITH IS PROVEN OR AN INJUNCTION BOND IS REQUIRED

Although Manta does not list it is an issue for review, its petition asks this Court to address whether the City should have been required to post a bond. Since Manta never appealed the decision not to impose a bond condition, that question is not properly before this Court. However, federal injunction bond law is yet another reason why the City is not liable and Manta's petition is without merit.

A. ADDITIONAL FACTS RELEVANT TO THIS ISSUE

At the time the TRO and preliminary injunction were granted, Manta still had a lawsuit pending in

federal court. Its state court opposition to the TRO and preliminary injunction expressly did not raise any federal law issues.

> At this state of the proceedings Defendant is relying primarily upon Article I, Section 2 of the California Constitution because it does not want to have the federal court abstain from exercising jurisdiction. Defendant does not believe it is fair for the City to force it to give up a federally protected right and it declines to do so.

That left state law as the only possible basis for requiring a bond. The trial court ruled that no bond would be required as a matter of state law. Since no federal issues were raised, the trial court made no ruling based on whether a bond should have been required as a matter of federal law.

Manta's opposition to the petition for stay pending appeal did request a bond, and did not limit the request to state law, but it presented no evidence to support any amount of a bond. The court of appeal granted the stay without ever addressing the bond issue. Manta did nothing in response.

B. MANTA NEVER APPEALED THE DECISION NOT TO IMPOSE A BOND CONDITION

Although Manta asks this Court to decide whether a bond condition should have been imposed, Manta never raised that issue below. Again, the trial court's decision to grant a

preliminary injunction without imposing a bond condition was based entirely on California law. Manta appealed the merits of that decision but never once mentioned the bond issue. The court of appeal granted a stay without any mention of a bond condition. Manta did not seek reconsideration in the court of appeal and did not petition the California Supreme Court. As a result, there literally is no decision on this issue which this Court could review.

C. MANTA FAILED TO PRESENT ANY EVIDENCE TO SUPPORT AN INJUNCTION BOND CONDITION

A defendant who wants an injunction bond condition imposed has the burden of asking for that condition and the burden of submitting evidence to provide the court with evidence which would allow the court to determine the amount of the bond. A defendant who fails to do so waives any entitlement to an injunction bond condition and to any damages based on the preliminary injunction. See Doctors Associates, Inc. v. Stuart, 85 F.3d 975, 985 (2nd Cir. 1996); Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882-883 (9th Cir. 2003).

Manta never presented any evidence of likely harm and no evidence which would have allowed either court to determine the amount of a bond.

D. UNDER FEDERAL LAW, THERE IS NO LIABILITY FOR AN INJUNCTION EXCEPT TO THE EXTENT A BOND CONDITION WAS IMPOSED AND ACCEPTED

This portion of Manta's arguments misrepresent the law. At page 14 of its petition Manta baldy asserts that "traditionally a plaintiff who obtains a preliminary injunction but who later loses at trial has to pay the defendant for the damage caused by the preliminary injunction." At page 19 of its opinion Manta asserts that "with respect to preliminary injunctions absolute liability is the norm." Manta cites nothing to support either statement because settled federal law is just the opposite. It has been settled federal law for more than a century that the act of seeking a preliminary injunction or stay pending appeal is not a tort or wrongful act, and does not give rise to liability or damages, even if the court later rules that the preliminary injunction or stay should not have been granted. Under federal law, it is a wrongful act, and a potential ground for liability, only if the preliminary injunction or stay was sought in bad faith, or if the defendant can prove malicious prosecution.

However, courts do have the equity power to impose conditions when they grant preliminary injunctions or stays pending appeal. Any damages are based on the imposed and accepted conditions, not on the ground that it was a wrongful act to seek the preliminary injunction or stay. *The City*, not Manta, raised this issue in the courts below.

1. Asking a Court to Issue a Preliminary Injunction or Stay Is Not a Wrongful Act Unless Malicious Prosecution or Bad Faith Is Shown

For over a century federal cases have agreed that federal courts lack any power to award damages based on a preliminary injunction or stay unless (1) bad faith or malicious prosecution is proven or (2) the court requires an injunction bond as a condition of issuing the injunction. In addition to the cases cited below, see W. R. Grace & Co. v. Local Union 759, 461 U.S. 757, 770, n. 14 (1983) ("A party injured by an injunction later determined to be erroneous has no action for damages in the absence of a bond"); Russell v. Farley, 105 U.S. 433, 437-438 (1881) ("Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit it may deem equitable and just"); Lawrence v. St. Louis-San Francisco Railway Co., 278 U.S. 228, 233 (1929) ("If it had not, when entering the interlocutory decree, required that bond be given, no damages could have been recovered on the dissolution of the injunction"); Benz v. Compania Naviera Hidalgo, 205 F.2d 944, 947-948 (9th Cir. 1953) ("in the absence of such a bond, there may be no recovery of damages for the issuance of a temporary injunction even although it may have been granted without just cause").

Under settled federal law, there is potential liability for a preliminary injunction or stay in the

absence of an injunction bond only if malicious prosecution or bad faith is alleged and proven. Coyne-Delany v. Capital Dev. Bd. 717 F.2d 385, 393 (7th Cir. 1983); International Association of Machinists and Aerospace Workers v. Eastern Airlines, Inc. 925 F.2d 6, 10 (1st Cir. 1991), cert. den. 502 U.S. 901 (1991).

2. If a bond condition is imposed and accepted, damages can be based on the acceptance of that condition

Under federal law, a court which imposes an injunction bond condition as a condition of obtaining a preliminary injunction or stay pending appeal has the power to order the plaintiff to comply with that condition and to pay the damages caused by the preliminary injunction or stay, up to the amount of the bond. Damages awarded on this basis are not awarded due to any tort or wrongful act, but as part of the court's equity power to impose a condition on the issuance of the preliminary injunction or stay and the plaintiff's acceptance of that condition.

If no bond condition is imposed, there is no basis for awarding damages, because the condition was never imposed or accepted. Similarly, if a bond condition is imposed and accepted, the amount of the injunction bond is a cap on permissible damages, because the amount of the bond is the extent of the condition imposed at the time the preliminary injunction or stay was issued. W. R. Grace, 461 U.S. at 770 ("A party injured by the issuance of an injunction later determined to be

erroneous has no action for damages in the absence of a bond"); Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1167 (9th Cir. 1976), cert. den. 431 U.S. 903 (1977) ("It is a well-settled rule that there can be no recovery for damages sustained by a wrongful issuance of a preliminary injunction in the absence of a bond"); In re Ladner, 799 F.2d 1023, 1025-1026 (5th Cir. 1986) (no bond issued, so recovery denied); Cagan v. Mutual Benefit Life Ins. Co., 28 F.3d 654, 656 (7th Cir. 1993) (same); Mead Johnson & Co. v. Abbott Laboratories, 209 F.3d 1032, 1033 (7th Cir. 2000), cert. den. 531 U.S. 917 (2000) ("if the injunction is reversed, compensation for harm caused by the injunction cannot exceed the amount of the bond"); International Association of Machinists 925 F.2d at 10 (recovery limited to the amount of the bond); Matek v. Murat, 862 F.2d 720, 733 (9th Cir. 1988) (same); Coyne-Delany, 717 F.2d at 393 (same).

A plaintiff who seeks a preliminary injunction or stay has no obligation to accept conditions a court imposes. Rather, if a federal court exercises its discretion to require a bond, the injunction bond is the "price of the injunction" and a plaintiff who considers that price too steep is free to decide not to post a bond and to forego the injunction or stay. Coyne-Delany, 717 F.2d at 394; Sprint Communications Company v. CAT Communications International, Inc., 335 F.3d 235, 240 (3rd Cir. 2003). The plaintiff's right to make that election arises at the time the bond condition is imposed, and a bond condition cannot be imposed retroactively after the preliminary

injunction or stay is dissolved. Mead Johnson, 209 F.3d 1033-1034.

3. No injunction bond condition was imposed or accepted

Since no bond condition was ever imposed, the City was never required to decide whether to accept such a condition.

Manta contends there is liability for damages simply because a defendant asks a court to impose a bond condition. Settled law rejects that contention. If no bond condition is not imposed and accepted, there is no basis for liability unless the defendant can show bad faith or brings a separate action for malicious prosecution. Buddy Systems, 545 F.2d at 1167; In re Ladner; Cagan. It is also settled that a plaintiff has a choice whether to accept or reject a bond condition at the time the preliminary injunction is issued; a bond condition cannot be imposed or increased retroactively. Coyne-Delany, 717 F.2d at 394; Sprint Communications Company v. CAT Communications International, Inc. (3rd Cir. 2003) 335 F.3d 235, 240; Mead Johnson, 209 F.3d 1033-1034.

4. Summary

Since the preliminary injunction was decided solely as a matter of California law, and since Manta never appealed the decisions not to impose a bond condition, the issue as Manta frames it is not properly before this Court.

However, settled federal law holds that requesting an injunction or stay is not a wrongful act, but a court can condition the injunction or stay on a bond. If the court chooses to impose that condition, the plaintiff has a choice whether to accept or reject that condition. If no bond is required, there is no basis for damages, and if the bond condition is accepted, the bond is the cap on damages. A bond condition cannot be imposed retroactively. Since no bond condition was ever imposed or accepted, there is no basis for damages without showing bad faith.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition should be denied.

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Supreme Court, U.S.
FILED
OCT 24 2008
OFFICE OF THE CLERK

No. 08-325

In the
Supreme Court of the United States

MANTA MANAGEMENT CORPORATION,
Petitioner,

v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION

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I INTRODUCTION

On September 8, 2008 Petitioner Manta Management Corporation (hereinafter "Manta") filed a Petition for Writ of Certiorari with this Court to review a final judgment of the California Supreme Court. The City filed its Brief in Opposition on October 10, 2008. Pursuant to Supreme Court Rule 15(b), Manta herewith submits this Reply. While there is no deadline for this Reply Manta understands the clerk may distribute the Petition and Brief in Opposition on or after October 20, 2008, to the Court, and will distribute this Reply to the Court when it is filed. See Rule 15(5).

II THE CITY'S BRIEF IN OPPOSITION CONTAINS ERRORS

It is unfortunate that the City makes false statements in its Brief in Opposition to Petition for Writ of Certiorari. This is typical of the conduct of the City throughout this litigation. As the California Supreme Court recognized, the fight between the City and Manta began with the City providing ". . . misinformation regarding the number of sites and acres within the city on which adult entertainment businesses could operate. . . ." (Emphasis added) Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 413 (2008); Pet. For. Cert., Appendix C, page 23a.

Now, near the end of this almost 15 year fight for constitutional rights the City in the first page of its "Statement of Facts and of the Case" (set forth at page 4, second paragraph) falsely states,

> ". . . The TRO and preliminary injunction did not prevent operation; they simply required Manta's employees to keep their clothing on pending a trial."

To the contrary the TRO prohibited Manta " . . . from presenting any live adult entertainment . . . including . . . erotic touching of human . . . buttocks . . . or female breasts . . . ." See Clerk's Transcript, page 68, lines 20-25, in People v. Manta Management Corporation, California Court of Appeal No. E019635, which the California Supreme Court judicially noticed. See Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 403, footnote 2; Pet. For Cert., Appendix C, page 6a. The preliminary injunction included the same language. See Clerk's Transcript, p. 622.

The California Supreme Court characterized the preliminary injunction: The " . . . preliminary injunction . . . ordered Manta to cease adult cabaret performances at the club. . . ." Id. At 404; Pet. For Cert, Appendix C, page 8a.

The City's misstatement at the beginning of its Brief in Opposition was deliberate. It was designed to minimize the constitutional violation and subtly influence this Court to believe the case is not worthy of review.

At page 5 of its Brief in Opposition, the City improperly attempts to relitigate the underlying case. Then, the City mischaracterizes the Writ of Supersedeas issued by the California Court of Appeal. The City says the Writ of Supersedeas " . . . only

required it to keep its "dancers" clothed pending the resolution of the appeal. . . . ." The California Supreme Court did not limit the description of the writ. The California Supreme Court stated,

> ". . . [T]he Court of Appeal issued a writ of supersedeas (the stay) that prevented Manta from 'operating as an adult business' pending resolution of the appeal. . . ." Id. at 405; Pet. For Cert., Appendix C, page 9a.

The City's discussion of "Liability and Damages Proceedings" states

> ". . . Manta's case therefore rested on the premise that the act of requesting a preliminary injunction, and the act of requesting a writ of supersedeas pending appeal, violated the First Amendment."

The City's misstatement above as to Manta's case misled the California Supreme Court into misstating the issue. The California Supreme Court stated:

> ". . . The issue before us is whether the City's act of seeking an injunction to enforce the ordinance dealing with the location of adult businesses and its subsequent act of filing a petition for writ of supersedeas to obtain a stay pending appeal 'caused' the harm suffered by Manta to the extent that the City is liable for damages Manta incurred during the 53 months the injunction and stay were in place." Id. at 407; Pet. For Cert., Appendix C, page 13a.

After misstating the issue based upon the City's mischaracterization of Manta's argument, the California Supreme Court correctly quoted from the California Court of Appeal's decision, which concluded that it was

> ". . . [t]he city's act of obtaining an injunction to enforce an unconstitutional ordinance . . . [that was] an act in violation of the First Amendment within the meaning of Section 1983. . . ." Id. at 408; Pet. For Cert., Appendix C, page 13a. (Emphasis added)

After correctly paraphrasing the theory announced by the State Court of Appeal, which is that "the City's act of obtaining an injunction to enforce an unconstitutional ordinance is an act in violation of the First Amendment," the California Supreme Court inexplicably reverted to its earlier mischaracterization of the issue as to whether it was " . . . the city's seeking a preliminary injunction and a stay . . . [which] were acts in violation of the First Amendment that caused injury to Manta . . ." (Emphasis in original) Id., at 408; Pet. For. Cert., Appendix C, pp. 13a to 14a.

What all this means is that the California Court of Appeal properly recognized that the basis for liability was the obtaining of the injunction, not the seeking of the injunction. Obviously the act of the City in seeking an injunction causes no damage. It is, rather, the successful obtaining of the preliminary injunction which causes the damage. That injunction could not have been obtained in the absence of the unconstitutional ordinance which the City itself adopted.

Throughout this litigation the City kept hammering on the theme that it could not be held liable for simply seeking an injunction. Of course that is true. What Manta complained about in this case and which was the basis of liability imposed by the trial court and sustained by the Court of Appeal was the successful obtaining of the preliminary injunction and the successful obtaining of the Writ of Supersedeas fr m the Court of Appeal.

The California Court of Appeal below recognized the difference between simply seeking an injunction on the one hand and obtaining the injunction on the other. The Court of Appeal clearly understood that the basis of liability here was not the fact that the City sought the preliminary injunction and sought the Writ of Supersedeas but that the City was successful. The California Court of Appeal stated in the opinion below for that Court,

> ". . . [A] section 1983 action based upon a city's act of obtaining an injunction to enforce an unconstitutional ordinance is also not subject to the rule that damages may be recovered only in an action on a bond."

The only other state appellate courts to deal with this issue is the Tennessee Supreme Court and the Tennessee Court of Appeals. The City argues in this Court that the Tennessee decisions are not contrary to the California Supreme Court because the Tennessee courts did not deal with the precise issue decided by the California Supreme Court. This is false. The Tennessee appellate courts clearly ruled that the wrongfully issued injunction to enforce an

unconstitutional ordinance gave rise to liability on the part of the city. While it is true the Tennessee courts did not deal with the issue in detail the decision does stand unless this Court disapproves it. The City has cited no case for the contrary proposition.

The City does not state that the decision of the California Supreme Court below is consistent with the decision of this Court in Malley v. Briggs, 475 U.S. 335 (1986). Rather, the City simply argues that the statement by this Court in footnote 7 in Malley v. Briggs, was merely dictum. Manta concedes that this Court's statement in Malley v. Briggs was dictum. However, certiorari certainly may be granted to clarify dictum by this Court since lower courts do afford dictum from this Court great weight even though technically it is not binding on the lower courts.

The City misses the point in its discussion of the issue before this Court. Manta has not argued that there is liability automatically whenever a city seeks and obtains a preliminary injunction that is later dissolved. The more narrow issue here, and the issue that was before the Tennessee appellate courts in City of Knoxville v. Entertainment Resources, 166 S.W.3d 650 (Tenn. 2005), cert. denied, 545 U.S. 1061, 163 L.Ed.2d 627, 126 S.Ct. 798 (2005) is whether a city should be held liable under the Civil Rights Act when it enforces its own unconstitutional ordinance by obtaining a preliminary injunction later dissolved upon a determination that the ordinance is unconstitutional. We would have a different case if the City of San Bernardino simply went to court to enforce a state statute. Arguably the City should not be held responsible if a statute adopted by the State

Legislature and signed by the Governor turns out to be unconstitutional. This case is limited to an unconstitutional City ordinance adopted by the very City that obtains a preliminary injunction to enforce it. Under these circumstances there is liability, or should be liability, under the Civil Rights Act. The City must be held accountable for the adoption of its own unconstitutional ordinance. It has no one else to blame.

Arguably a trial court judge might be justified in issuing a preliminary injunction when a state statute is being enforced. However, when a city seeks enforcement of its own ordinance the city is impliedly guaranteeing the validity of that ordinance. The city is standing behind that ordinance. If it is later held to be invalid the city should have to pay. Why should the constitutional right of the person preliminarily enjoined be damaged without redress.

III THE ISSUES RAISED IN THE PETITION ARE WORTHY OF REVIEW

A. Constitutional Tort

Petitioner submits it was the act of obtaining the preliminary injunction which caused the damage, not the act of seeking the preliminary injunction. The Court of Appeal understood that concept. See Pet. For Cert., Appendix D, page 32a. Tort law is concerned with foreseeability. It was certainly foreseeable that if the City sought a preliminary injunction to enforce its ordinance a court would grant such a request.

B. Meaning of City of Littleton v. Z.J. Gifts

This Court stated in City of Littleton v. Z.J. Gifts, 541 U.S. 774 (2004) that 42 U.S.C. Section 1983 provides "federal remedies" as "an additional safety valve" if the state courts are not responsive to the special needs of adult businesses in First Amendment zoning cases. Clearly the California courts were not helpful to Manta. So, the question is what did this Court mean when it referred to federal remedies under 42 U.S.C. Section 1983.

Obviously, Manta could not have gone immediately to the federal court for injunctive relief. It did go originally, but was thrown out on preemption grounds. Under this Court's decisions in Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed. 206 (1983). Manta contends it did have the right under 42 U.S.C. Section 1983 to seek damages under the federal statute in the state court. If not, this Court should clarify its decision in Z.J. Gifts.

IV THERE IS NO NEED TO AWAIT REMAND

In its summary of argument at page 2 of its Brief in Opposition the City falsely states that the Supreme Court of California "remanded for a trial on whether the courts were materially misled. . . ." Brief in Opposition, page 2.

In contrast to the City's mischaracterization of what the State Supreme Court did, the Supreme Court

did not remand the matter for trial. Rather, as the Supreme Court stated in its last paragraph,

> " . . . [W]e . . . remand the cause to that court [Court of Appeal] with directions to remand it in turn to the Superior Court with directions to conduct proceedings consistent with the views expressed herein." See Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 414 (2008); Pet. For Cert., Appendix C, p. 24a.

There is a difference between a "proceeding" on the one hand and a "trial" on the other. There is not to be a new trial in this case. The issue to be decided on remand is whether there was a material misrepresentation made by the City and the City has already acknowledged that it made a misrepresentation. The only issue was whether it was material.

Based upon this limited remand the City argues this Court should not take the case at this stage of the proceedings.

This Court has frequently rejected such an attempt to subvert this Court's certiorari jurisdiction. Among the cases dealing with this issue are:

1. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989);

2. Pennsylvania v. Ritchie, 480 U.S. 39, 94 L.Ed.2d 40, 107 S.Ct. 989 (1987);

3. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975);

4. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 41 L.Ed.2d 730, 94 S.Ct. 2831 (1974); and

5. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 38 L.Ed.2d 379, 94 S.Ct. 407 (1973).

6. Asarco Inc. v. Kadish, 490 U.S. 605, 104 L.Ed.2d 696, 109 S.Ct. 2037 (1989).

Manta respectfully submits that these cases clearly support the proposition that this Honorable Court does have jurisdiction to entertain Manta's Petition for Writ of Certiorari.

Fort Wayne Books, Inc. v. Indiana, supra, appears to be directly on point. The case involved the seizure prior to trial of the property of three adult bookstores. This was done pursuant to a pre trial seizure order. No trial date was set and the bookstores sought to vacate the prior seizure order. The trial court refused relief but did certify the constitutional issues to the Indiana Court of Appeals, which ruled the seizures to be in violation of the U.S. Constitution. The Indiana Supreme Court reversed the Indiana Court of Appeals. The case was to be then submitted to the Indiana trial court. The adult bookstores sought review in this Court, which addressed its own jurisdiction under Title 28, United States Code, Section 1257. The specific jurisdictional issue was whether this Court had jurisdiction to resolve the merits of the case given the fact that there had yet to be a trial and that the

matter had been remanded to the Indiana trial court for trial.

This Court in the Fort Wayne Books case referred to its earlier decision in Cox Broadcasting Corp. v. Cohn, supra, where this Court in Cox stated,

> "[W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the parties seeking review here might prevail on the merits on non federal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . in the state court proceeding still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the court has entertained and decided the federal issue, which itself has been finally determined by the state courts for the purposes of the state litigation." Id., 489 U.S. at 55.

Here review by this Court and the reinstatement by this Court of the decision of the California Court of Appeal would obviate the need for further proceedings. It would also resolve an important federal issue involving the First Amendment and the interpretation of the Federal Civil Rights Act.

This is an extremely important case. Contrary to the position of the City, there is a conflict between the decision of the California Supreme Court and the

decision of the Tennessee Supreme Court. Review now will obviate the need for further proceedings in the Superior Court below. The issue to be resolved on remand is irrelevant. The California Court of Appeal below did not need to remand it. Reversal by this Court of the California Supreme Court's decision and reinstatement of the California Court of Appeal's decision will bring finality to this litigation.

V CONCLUSION

For the foregoing reasons and for the reasons expressed in the Petition for Writ of Certiorari, Petitioner Manta Management Corporation respectfully asks this Honorable Court to grant the Writ of Certiorari to review the judgment below.

Respectfully submitted,

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